PP

v.

CHIN KEEM FEUNG & ANOTHER CASE

SESSIONS COURT, KUALA LUMPUR
JAGJIT SINGH BANT SINGH SJ
[ARREST CASE NO: 62A-(483-484)-2007]
21 JUNE 2012

COMPANY LAW: *Directors - Role of independent non-executive directors in listed company's audit committee ('AC') - Whether AC required to detect wrongful acts in conduct of affairs of company and provide independent advice to board of directors before decisions made - Whether incumbent on AC to ensure financial statements issued by listed company accurate and reliable to protect investing public*

CRIMINAL LAW: *Statutory offences - Securities Industry Act 1983, s. 122B(b)(bb) - Knowingly authorising furnishing of misleading statement relating to financial affairs of company to Bursa Malaysia - Whether accused presented credible defence - Whether prosecution proven case beyond reasonable doubt*

The first and second accused persons were independent non-executive directors as well as, respectively, the chairman and member of a three-man audit committee ('AC') of a public-listed company ('TGB') whose main revenue-earning subsidiary was TAS. Both accused persons were charged with knowingly authorising the furnishing of a misleading statement relating to the financial affairs of TGB in the company's 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006' ('the report') to Bursa Malaysia, an offence under s. 122B(b)(bb) of the Securities Industry Act 1983. As a listed company, TGB was required to submit to Bursa Malaysia quarterly reports of its unaudited financial results after they were approved and adopted by the company's board of directors ('BOD'). The BOD would give such approval only if the AC gave the go-ahead to do so. The members of the AC in the instant case were also members of the BOD. At a meeting of the AC a day before the report was to be tabled before the BOD, TGB's external auditors ('DT') met with the AC to express their concerns about certain unusual transactions ('the contra transactions') involving TAS which 'lacked commercial justification' and involved huge sums of money and, in DT's opinion, rendered the financial statements in

A the report inaccurate. Even though the audit process was not concluded and DT wanted further documents from management to investigate further into the suspicious contra transactions, DT urged the accused to bring up the matter with the BOD the following day. Both accused persons, however, did not raise the
B audit issues at the BOD meeting and, in fact, participated in approving the report for release to Bursa Malaysia. The prosecution's evidence showed the revenue figures announced in the report were false and misleading.

C **Held (finding both accused guilty of the charge and sentencing them to a year's jail and a fine of RM300,000 in default six months' jail):**

(1) The evidence showed both accused blatantly disregarded the serious concerns raised by the external auditors about the
D contra transactions and deliberately refrained from informing the BOD about the transactions despite being advised to do so by the external auditors. The offence they committed could not be treated lightly. Independent non-executive directors or AC members were not decorative pieces of a company but
E held responsible office. The investing public, shareholders, creditors and other persons who dealt with the company relied very much upon them. They were there to protect the shareholders and the investing public and they had to carry out their duties and functions independently and responsibly
F (paras 135 & 136)

(2) The AC's role was to detect wrongful acts or conduct committed in the affairs of the company. That was why the Bursa Rules required the majority members in an AC to be
G independent, non-executive directors including the chairman. The AC had to carry out its duties and responsibilities itself and not delegate them to, or rely upon, management. Its very purpose was to bring independent judgment and advice to the decision-making process of the BOD. It played an important
H role to ensure the integrity of financial statements issued by the listed company. As those statements were relied upon by the investing public, the information given had to be complete and accurate (paras 80, 85 & 86)

I **(3)** Although the audit had not been finalised when the external auditors met with the AC, it was not necessary for the auditors to have expressly used the terms 'not true, false or

misleading' with reference to the contra transactions. The accused were briefed that the transactions were very unusual and lacked commercial justification and involved huge sums of money and that the unaudited figures could not deviate materially from the audited figures that were released later. Given that briefing, the AC members could not say the accounts were accurate when the report was tabled before the BOD yet they deliberately chose to disregard the evidence that was placed before them by the external auditors. (paras 28, 33 & 58)

(4) The defence put forward by the accused was not credible. The court found both accused persons were untruthful witnesses. They failed to raise a reasonable doubt on the prosecution's case. The prosecution had succeeded in proving the charge against them beyond reasonable doubt. (para 131)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***

Escott, et al. plaintiffs v. BarChris Construction Corporation [1968] 283 F Supp 643 ***(refd)***

Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***

PP v. Chettuvelu Nani [2007] 9 CLJ 533 HC ***(refd)***

PP v. Gan Kiat Bend & Another Case [2011] 8 CLJ 951 SC ***(foll)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Re Barings Plc & others (No 5), Secretary of State for Trade and Industry v. Baker and others (No 5) [1999] 1 BCLC 433 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 153(1), 173(m), 376
Evidence Act 1950, s. 32(1)(i)
Federal Constitution, art. 145
Securities Industry Act 1983, s. 122B(b)(bb)

For the appellant - Shanti Geoffery (Rifhan with her); DPP
For the first respondent - Mohd Firuz Jaffril; M/s Firuz Jaffril, Aidil & Zarina
For the second respondent - Tan Hock Chuan (Kumaraendran & Guok Ngek Seong with him); M/s Tan Hock Chuan & Co

Reported by Ashok Kumar

A

JUDGMENT

Jagjit Singh Bant Singh SJ:

[1] An independent non-executive director of a company or an audit committee member is not a decorative piece of a company. They are vital organs of a company, in particular when it comes to corporate governance. They have specific duties, functions and responsibilities in the company and the investing public shareholders rely very much upon them. They are there to protect the shareholders of the company and other investing public. An independent director or an audit committee member cannot absolve his or her responsibilities by pushing the responsibility or delegating it to the executive arm of the company. They are appointed for their specific roles and they must carry out their duties, functions and responsibilities independently and responsibility.

[2] It is trite that a person who accepts the office of an independent director or an audit committee member undertakes the responsibility of ensuring that he or she understands the nature of the duty, functions and responsibilities of an independent director or an audit committee member. The task of an independent director or an audit committee member is an onerous one and cannot simply be discharged by appearing at the company four times a year to sign off the quarterly reports while in the comfort of having coffee. Certainly their task is not that of having free coffee four times a year to sign off some financial reports without even deliberating over them. They owe a duty and responsibility to the shareholders of the company and other public investors who could be relying on the financial reports of the company.

[3] Chin Keem Feung, (the first accused) and Shukri Sheikh Abdul Tawab (the second accused) were independent directors and audit committee members. They were charged with knowingly authorising the furnishing of misleading information to Bursa Malaysia Securities Berhad (Bursa Malaysia) on 15 February 2007 pertaining to a public listed corporation, namely Transmile Group Berhad's (TGB), Quarterly Report on Unaudited Consolidated Results for the financial year ended 31 December 2006 (Fourth Quarterly Results), an offence under s. 122B(b)(bb) of the Securities Industry Act 1983 (SIA). The charge read as follows:

That you, on 15 February 2007, at Bursa Malaysia, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, knowingly authorized the furnishing of a misleading statement to Bursa Malaysia Securities Berhad in relation to the affairs of a listed corporation, namely Transmile Group Berhad's "Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006", and the misleading statement is underlined in red in the appendix to this charge and you have thereby committed an offence under s. 122B(b)(bb) of the Securities Industry Act 1983 (Act 280) and punishable under the same section.

Background

[4] The prosecution called 11 witnesses and their evidence very briefly is as follows:

(a) TGB is a public listed holding company. A large portion of TGB's revenue was contributed by its main subsidiary Transmile Air Services (TAS);

(b) the financial year end of 2006 for TGB was 31 Disember 2006. As a listed corporation, TGB was required to furnish its unaudited financial results four times a year (quarterly results). The quarterly results were required to be approved and adopted by TGB's Board of Directors (BOD) before they are released to the Bursa Malaysia;

(c) TGB was also required to announce its audited financial statements once a year after its financial year end. For financial year end 31 Disember 2006 TGB was required to issue its audited financial statements by 30 April 2007;

(d) it is trite that the results contained in the quarterly results cannot deviate significantly from the results in the audited financial statements;

(e) the fourth quarterly results were required to be submitted to Bursa Malaysia on or before 28 Disember 2007. Before the fourth quarterly results are tabled at the BOD, they must be approved by the audit committee;

(f) at all material times, the first accused was the chairman and the second accused a member of the audit committee. The other member of the audit committee was Khiudin. As the audit committee was a sub committee of TGB, both the accused were also members of the BOD;

(g) the audit committee had on 14 February 2007 considered and approved the fourth quarterly results. TGB had on 15 February 2007, furnished to Bursa Malaysia its fourth quarterly results as well as its cumulative financial results for 2006. These results were contained in a set of financial statements titled 'Quarterly Report on Unaudited Consolidated Results for Financial Year ended 31 December 2006';

(h) on the 14 February 2007 audit committee meeting, both the accused were made aware by the external auditors of TGB, Deloitte & Touche (Deloitte) of their concerns on various audit issues which related to the revenue figures that were to be reported in the quarterly results to the BOD the next day. The audit committee was urged to bring these issues to the BOD's attention the next day;

(i) however, on 15 February 2007 at the BOD's meeting, neither the first nor the second accused raised the audit issues to the BOD. Both the accused had deliberately approved the released fourth quarterly results which contained the misleading statements;

(j) these fourth quarterly results which forms part of the unaudited condensed consolidated income statements in the financial year ended 31 December 2006 are set out in the appendix to the charge; and

(k) the revenue figures as announced by TGB to Bursa Malaysia in respect of the fourth quarter of 2006 and the cumulative period for the whole of 2006 were misleading as they consisted of a large percentage of fictitious transactions.

Prima Facie Case

[5] I had explained the test for a *prima facie* case in my earlier reported decision of *PP v. Gan Kiat Bend & Another Case* [2011] 8 CLJ 951. I am using the same *prima facie* test in this case which is that in order for the court to be satisfied that a *prima facie* case has been made out, the court must undertake a maximum evaluation of the prosecution evidence. According to Gopal Sri Ram JCA (as he then was) in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 399:

> This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.
>
> ... If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt.

[6] The test at the close of the prosecution case is therefore:

> If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? ... If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

Elements Of The Charge

[7] The prosecution is required to prove the following ingredients against the first and the second accused:

(a) that TGB is a listed corporation;

(b) the first and the second accused knowingly authorised the furnishing of a misleading statement to Bursa Malaysia in relation to the affairs of TGB on 15 February 2007;

(c) the misleading statement is contained in TGB's 'Quarterly Report on Unaudited Consolidated Results for the financial year ended 31 December 2006' (fourth quarterly results).

TGB A Listed Corporation

[8] I am satisfied that there is overwhelming oral and documentary evidence to show that TGB is a public listed corporation. This ingredient of the offence is not disputed by both the accused.

Both The Accused Knowingly Authorised The Furnishing Of A Misleading Statement To Bursa Malaysia In Relation To The Affairs Of TGB On 15 February 2007

Furnishing Of The Fourth Quarterly Results To Bursa Malaysia

[9] Roseliliwati bte Md Ghazali (SP2), who is the Head of Bursa Link and who is responsible for the online system which listed companies use to make their announcements for public release confirmed that exh. P13, that is the announcement made by TGB on 15 February 2007, was submitted to Bursa Malaysia on the 15 February 2007 at 5.12pm. She confirmed that the attachment to the announcement by TGB contained the revenue figures of RM338,473,000 for the fourth quarter and RM989,191,000 for the cumulative period for 2006.

[10] Tan Sri Razak bin Ramli (SP6), a Director of TGB testified that on 15 February 2007, the BOD had approved the fourth quarterly results before they were notified to Bursa Malaysia. That these fourth quarterly results are in relation to the affairs of TGB is not disputed. SP6 explained that the BOD meetings are held at least four times a year to approve the financial results which are required to be reported to Bursa Malaysia. SP6 also confirmed that exh. P13 which contained the fourth quarterly results that is, TGB's revenue figures of RM338,473,000 and RM989,191,000 were announced to the Bursa Malaysia.

[11] The fact that the BOD met on 15 February 2006 and approved the fourth quarterly results was corroborated by Tan Peck Meng also known as May Tan (SP8), TGB's company secretary. She said that after the BOD approved the financial results, the results were announced to Bursa Malaysia on the same day. She also confirmed that the revenue figures announced to the Bursa Malaysia are RM338,473,000 for the fourth quarter of 2006 and RM989,191,000 for the cumulative period of 2006.

Contra Transactions

[12] Stanley Teo (SP1), the audit principal of Deloitte, testified that while their external auditors were carrying out their final audit of TGB, Gary Huang Khean Yeong (SP3), a Senior Manager with Deloitte in charge of TGB's external audit, had identified certain unusual transactions between TAS and several of its customers. He elaborated that the external auditors had noted that there were certain liabilities of TAS which arose from the acquisition of

fixed assets during the month of November and December 2006 and were paid by certain debtors or customers of TAS. He said that the auditors found this issue to be very unusual because these involved significant additions of fixed assets in the last two months of the year which were paid by certain debtors of TAS. He stated that there were quite a number of debtors who were involved in the payment of this liability of TAS. He added that the auditors found no written communication between the suppliers of fixed assets and the customers who helped to pay on behalf of TGB and TGB itself. There were also no written payment instructions given by TGB to the debtors for the debtors to make such payments.

[13] SP1 said that when they found out about these transactions (referred to as 'contra transactions') and asked the management of TGB (management) the rationale of such arrangements, the management was not able to provide satisfactory explanation. SP1 said that the external auditors also conducted a search at the Companies Commission of Malaysia (SSM) on the customers who made the payments and found that there were similarities amongst them. They had a share capital of RM2, had common registered office, had common directors and shareholders and were either dormant or inactive companies. In short SP1 found the contra transactions to be very unusual.

[14] SP1's evidence was corroborated by Jimmy Lai Can Yew (SP4) who is an Audit Principal and Executive Director of Deloitte. According to SP4, these contra transactions were brought to the attention of the management. The external auditors were however, not happy with the explanation given and therefore decided to bring this matter to the attention of the audit committee during its meeting on the 14 February 2007.

Both The Accused Knowingly Authorised The Furnishing Of A Misleading Statement To Bursa Malaysia

[15] The evidence adduced by the prosecution shows that both the accused had knowingly authorised the furnishing of a misleading statement to Bursa Malaysia that is the fourth quarterly results. This is evident from the fact that both the accused were members of the audit committee who had reviewed the financial statements on the 14 February 2007. The first accused was the chairman and the second accused a member of the audit committee at the material time. On 14 February 2007 the audit

committee was briefed by the external auditors on the contra transactions issues which impacted the veracity of the financial statements that the audit committee was deliberating upon on that day. They were urged to report these issues to the BOD the next day. Despite being told of these audit issues, both the accused, who were also members of the BOD, did not on 15 February 2007 bring these matters to the attention of the BOD. By not highlighting these matters to the attention to the BOD, but instead recommending the approval of the fourth quarterly results, both the accused had knowingly authorised the furnishing of misleading statements to the Bursa Malaysia in relation to the affairs of TGB.

[16] The following evidence amplifies that both the accused knew that there was a misleading statement in the fourth quarterly results:

(a) on 14 February 2007, the external auditors comprising of SP1, SP4 and their Head of Audit, Robert Tan, attended the audit committee meeting. The chairman of the audit committee was the first accused and the second accused and Khiudin attended as members. SP8 was also present. During this meeting the external auditors informed that their audit of TGB for financial year ended 31 December 2006 had not been completed because they had found certain transactions which they had not been able to receive satisfactory explanation and evidence. SP1 and SP4 had described to the audit committee the nature of the contra transactions which includes the following:

(i) certain additions to property, plant and equipment amounting to USD11 million were paid on behalf of TGB by certain debtors of TAS;

(ii) these involved ten debtors with revenue transacted amounting to USD50 million;

(iii) the balance as at 31 January 2006 from these ten debtors amounted to USD37 million;

(iv) they had carried out a search on these ten debtors and noted they shared the same registered office, that certain of these companies have common directors and shareholders, having RM2 paid up capital and were dormant or inactive;

(v) the auditors had not received any confirmation on the amount outstanding that they had sent out;

(vi) these transactions were very unusual and lacked commercial justification;

(vii) that they had discussions with management on this matter and the management informed them that they will provide them with the documents and information;

(viii) in the worst case scenario, there would be a qualification on the financial statements in the event the external auditors were not satisfied with the audit evidence;

(ix) that the company has until 30 April 2007 to file a copy of its audited financial statements and the unaudited results which they announce cannot deviate significantly from the audited results;

(x) there could be material adjustments resulting from the audit tests; and

(xi) that the audit committee look into this matter and deal with it; and

(b) SP4 had explained to the audit committee that it would be a serious matter if the accounts are qualified. SP1 added that they reminded the audit committee that the deadline for TGB to make the fourth quarterly results announcement to the Bursa Malaysia was 28 February 2007 and the due date for the issuance of the audited financial statement is 30 April 2007. They also reminded the audit committee that the results contained in the fourth quarterly results announcement cannot deviate significantly from the results of the audited financial statement. SP4 also confirmed that he urged the audit committee to report this issues to the BOD and that SP8 informed the external auditors that what was discussed would be brought up to the BOD the following day.

[17] According to SP1 the reason why the auditors approached the audit committee was that the audit committee was tasked with dealing with the external auditors on all matters relating to the external audit. He emphasised that the audit committee is the right channel for the external auditors to report anything before it goes to the BOD. He said that it is the audit committee's duty to report to the BOD any issue which is reported by the external

auditors after they have reviewed the financial statements. According to SP4, Deloitte had decided to send Mr Robert Tan, the Head of Audit to the audit committee meeting that day because the findings by the external auditors by that time were significant and the amount involved was significant.

[18] The evidence of SP1 and SP4 was corroborated by SP8 who confirmed that both the accused had attended the audit committee meeting on 14 February 2007. She said she was told by SP1 and SP4 that they were there to brief the audit committee on a very important matter. She said that the external auditors did mention to the audit committee that this matter is very serious and they raised the issue pertaining to the contra transactions and even stated that if the evidence relating to the contra transactions was not obtained this could result in the accounts of TGB being qualified. SP8 in her testimony said that after the audit committee meeting she did highlight to the audit committee the importance of bringing the matter to the BOD.

[19] The oral testimony of SP1 and SP4 who briefed the audit committee on 14 February 2007 is corroborated by the documentary evidence in the form of the minutes of the meeting that SP1 had prepared in exh. P12 that sets out the following:

(a) the auditors were not satisfied with the evidence provided so far in relation to the transactions;

(b) that they had selected ten debtors with provided revenue to them amounting to USD50 million during the year and an outstanding amount of USD37 million;

(c) that there had been no confirmation received from these debtors on the balance outstanding;

(d) that the debtors paid on behalf of TAS for the purchase of property, plant and equipment amounting to USD11 million;

(e) that the auditors had conducted a company search on these companies, with the result showing that these debtors were dormant companies with a share capital of RM2 and nominee directors and shareholders;

(f) that all these arrangements appear to be very unusual and lack commercial justification;

(g) in a worst case scenario the auditors would issue a qualified audit opinion on the financial statement of TGB;

(h) the quarterly announcement of TGB needs to be made by 28 February and the audited results need to be issued by 30 April;

(i) the announced results cannot deviate significantly from the audited results. There can be further adjustments arising from their audit test and these adjustments may be material; and

(j) SP8, represented that what was discussed at the audit committee would be brought to the attention of the BOD meeting the next day.

[20] SP1 and SP4 explained that they had highlighted the first set of company searches results for the ten companies to the audit committee on 14 February 2007. The evidence shows that the first set of ten company searches was requested on 12 February 2007 and the results were obtained on 13 February 2007 (exhs. P1 to P10). It is also necessary to point out that there was a second set of eight company searches carried out by SP3 after the audit committee meeting on 14 February 2007 and the results are found in exhs. P26 to P32 dated 16 March 2007. A summary of SP3's findings are tabulated in exh. P45, showing the common directors among the 18 companies which were purported customers of TGB and exh. P46 shows the common shareholders among the same companies.

[21] SP8 confirmed that she took down the minutes of the audit committee meeting on 14 February 2007. Her handwritten notes are now marked as exh. P76. She also confirmed that she had later converted her handwritten notes into a typewritten form (exh. P18). Exhibit P18 clearly sets out the audit issues which the external auditors had briefed the audit committee on 14 February 2007. According to SP8, exh. P18 included some of the salient points of the briefing by the external auditors including SP4 which are as follows:

(a) that the auditors had not obtained sufficient documentation and evidence on additions to the fixed assets of the company which have been paid on behalf by ten customers;

A (b) that there was no adequate evidence and explanation to support the figures particularly on trade debtors and fixed assets;

(c) the numbers may just be subject to material adjustments;

B (d) based on the ten debtors they had selected for their testing, there was no confirmation in writing for the transactions done;

(e) this is also in relation to USD50 million in sales and some collections had been done during the year;

C (f) in the worst case scenario, the accounts of the company would be qualified and the company would have to make an immediate announcement if there is a material adjustment, that is deviation of more than 10% in comparison with the D announced financial results in February 2007; and

(g) that SP4 urged the first accused to highlight the matter to the attention of the BOD.

[22] All these matters listed in exh. P18 were confirmed by the E oral testimony of SP8 and in particular when asked, 'Can you confirm that Mr Lai (SP4) urged OKT1 (the first accused) to highlight the matter to the attention of the board?' Her answer was 'Yes'. SP8 further added that after the audit committee meeting she had highlighted to the audit committee of the F importance of bringing the matter to the BOD.

[23] It must be pointed out that though the serious audit issues were documented in exhs. P12 and P18, these issues are not found in the formal minutes of the audit committee meeting (exh. G P14). SP8 explained that when she had finalised the 14 February 2007 audit committee minutes, she asked the first accused how the minutes should be worded, since the first accused was the chairman of the audit committee and he decides on the minutes. According to SP8 the first accused told her not to word the H minutes according to what transpired but "to hang on first, we don't have sufficient evidence and we do not want to trigger the BOD's attention unnecessarily until the audit committee does their part." Having considered SP8's evidence on this issue I accept the explanation of SP8 as to why the serious issues raised by the I external auditors were not reflected in exh. P14;

[24] The conduct of the first accused clearly shows that he knew the seriousness of the issues raised by the external auditors to the audit committee on the 14 February 2007 and attempted to cover up the fact from the formal minutes (exh. P14). A

[25] Both the accused as members of the BOD had recommended and approved the fourth quarterly results at the BOD's meeting without bringing to the attention of the BOD the serious issues raised by the external auditors. SP6 who attended the BOD on 15 February 2007 testified that the BOD approved the fourth quarterly results on 15 February 2007 which was presented by the first accused as the chairman of the audit committee. According to SP6, in order for the BOD to approve any financial results, the board would need those results to be examined and approved by the audit committee first before the board can approve it. He explained that the audit committee is a committee of the board and is made up of selected board members who are required to be independent members. According to SP6, the BOD was not made aware of any issues relating to the financial statements of TGB during its 15 February 2007 BOD's meeting. The board was only told that they were approving the unaudited fourth quarterly results for the previous year and that the audited results would be ready by April. B C D E

[26] SP6's evidence is corroborated by SP8, who had also attended the BOD's meeting on the 15 February 2007. SP8 categorically stated that the first accused who briefed the BOD did not mention any of the issues that were brought up to the audit committee by the external auditors on the 14 February 2007. SP6 also explained that the BOD will not approve the financial statements if the audit committee does not recommend it. SP6 also categorically added that in a situation where the external auditors have raised audit issues, the audit committee is required to alert the BOD if they cannot resolve it. SP6 also went on to explain that the first time that the BOD was made aware of the audit issues was when it was raised by the external auditors on the 27 April 2007 BOD's meeting. F G H

[27] From the evidence it is obvious that despite the external auditors highlighting the seriousness of the audit issues to both the accused on the 14 February 2007 and urging them to bring these issues to the attention of the BOD, neither the first accused nor I

A the second accused did so. By not raising the serious financial issues at the 15 February 2007 BOD's meeting and knowing fully well that these financial results were to be announced the same day, they had knowingly authorised the furnishing of a misleading statement to the Bursa Malaysia.

B

Both The First Accused And The Second Accused Knew The Nature And Consequences Of The Misleading Statement

[28] Both the accused as audit committee members were made fully aware of the consequences of authorising the furnishing of
C the financial statement by the external auditors. They were specifically told by SP4 that the revenue transactions underlying the quarterly financial statements which were being deliberated by the audit committee on the 14 February 2007 appeared very unusual and lacked commercial justification. They were told that
D these unaudited figures cannot deviate materially from the audited figures that were to be released by 30 April 2007. Both the accused cannot now argue that they did not know the nature and consequences of the misleading statement in the unaudited results.

E *Both The Accused Role As Audit Committee Members*

[29] Evidence was adduced to show that both the accused were aware of their role as audit committee members. Tee Yoke Hoong (SP9), a senior officer from Bursa Malaysia confirmed that as
F directors of a public listed company, both the accused are required to attend mandatory director's training course. According to SP9, it is a requirement of the Bursa rules that the audit committee must comprise of at least three members and the majority of whom must be independent directors. The chairman of the audit
G committee must be an independent director. The basis of this rule is that the audit committee plays an important role to ensure the integrity of financial statements issued by the listed company as these financial statements are relied upon by the investing public and therefore the information and the statements that are provided
H must be complete and accurate. The Bursa listing requirements (exh. P86) spells out the responsibilities of the audit committee in para. 15.13 which states that the audit committee must review and report to the board the quarterly results and year end financial statement prior to being approved by the BOD, focusing
I particularly on the following:

(a) changes in or implementation of major accounting policy changes;

(b) significant and unusual events; and

(c) compliance with accounting standards and other legal requirements.

[30] SP9 also explained that a report by auditors that more than 50% of the revenue to be disclosed in a particular quarter is suspicious or unusual would be considered significant or unusual within the listing requirements and must be brought to the attention of the board of directors as the audit committee is, after all, a sub committee of the board of directors. In the present case the fourth quarterly results which contained the misleading statement clearly fall within the terms 'significant and unusual events'.

[31] SP9 added that the audit committee's authority and duties are also set out in the written terms of reference which must be contained in every annual report of a public listed company. As such both the accused being experienced auditors would be aware of their roles as auditors.

[32] It was argued by the learned defence counsels that the third audit committee member, Khiudin, being an executive director, owed a greater responsibility then that of both the accused who are non-executive directors. I disagree. According to *Re Barings Plc & others (No 5), Secretary of State for Trade and Industry v. Baker and others (No 5)* [1999] 1 BCLC 433, it was held that:

> ... directors have, both collectively and individually, a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business to enable them to discharge their duties as directors.

[33] It was also argued by the learned defence counsels that both the accused had relied on the management and the executive director as they had no role or executive power over the management and therefore they had delegated the issues raised to Khiudin. Interestingly the *Barings* case has also laid down the principle that whilst directors are entitled to delegate particular functions to those below them in the management chain and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions. Similar views were held in the US case of *Escott, et al.*

plaintiffs v. BarChris Construction Corporation [1968] 283 F Supp 643 (USSDNY). I am also fully mindful that the Bursa listing requirements specifically provides that at least one third of the board must consist of independent directors. This rule demonstrates the importance of independent directors in stimulating greater independence and objectivity of the board. In order for a director to be considered independent, he would naturally have to be a non-executive director. As such the argument that both the accused relied on the management and Khiudin, the executive director, does not absolve them of their duties and functions as auditors. In any event in the present case both the accused had deliberately chosen to disregard the evidence that was placed before them by the external auditors on 14 February 2007 relating to the contra transactions and intentionally withheld the contra transactions information from the BOD.

The Misleading Statement Is Contained In TGB's Fourth Quarterly Results

[34] The evidence before me overwhelmingly shows that the misleading statement is contained in the fourth quarterly results. As forewarned by SP1 and SP4 to the audit committee on 14 February 2007, Deloitte did in fact subsequently issued a qualified audit opinion which meant that Deloitte's expressed concerns over the validity and recording of the contra transactions was founded.

[35] SP1 explained that TGB subsequently appointed a firm of special auditors who revealed an over statement of revenue, trade receivable and property, plant and equipment by TGB in its fourth quarterly results released on 15 February 2007. Based on the special audit, the BOD then made adjustments to the fourth quarterly results that were announced to Bursa Malaysia on 15 February 2006. The restatement is set out in exh. P24 and showed that the revenue that was previously announced at RM989,191,000 was adjusted to RM333,360,000. The audited revenue figure for financial year ended 31 December 2006 was revised downwards to RM656,831,000. This was set out in the announcement made by TGB to Bursa Malaysia in exh. P25.

[36] According to SP1, the adjustment of RM333,360,000 represented 33.7% of the announced revenue on 15 February 2007 and is about 50.8% of the adjusted revenue in the audited financial statements.

[37] TGB eventually issued its audited financial results on 29 June 2007 in exh. P24 and exh. P25. This was almost two months past the deadline required for submission of the annual audited accounts under the Bursa rules.

[38] SP1 also explained that the audited financial results which were announced by TGB on 29 June 2006 in exh. P24 involved significant adjustments to the figures which were released on 15 February 2007 in exh. P13. SP1 highlighted the portion of exh. P24 called the 'Report of the Auditors to the Members of Transmile Group Berhad' where it was stated that during the course of the audit for the year ended 31 December 2006, the auditors had expressed concerns to the management and the former audit committee over the validity and recording of certain transactions for which they were not able to obtain relevant supporting evidence and satisfactory explanation. These transactions involved a recorded revenue of RM290 million to 18 companies. Certain of these companies have common directors and shareholders. As at 31 December 2006, the amount owing by these 18 companies amounted to approximately RM209 million. There was also an addition of property, plant and equipment of RM56 million with corresponding credit entries against represented payment by the customers on behalf of TGB for the purchase of the property, plant and equipment by TAS.

[39] Having considered all the prosecutions evidence as cross examined by the learned defence counsels and all the submissions I was satisfied that the prosecution has established a *prima facie* case against both the accused. In other words both the accused had knowingly authorised the furnishing of a misleading statement to Bursa Malaysia in relation to the affairs of TGB on 15 February 2007 and that the misleading statement is contained in TGB's 'Quarterly Report on Unaudited Consolidated Results for the financial year ended 31 December 2006'.

The Defence

[40] The first accused (SD1) and the second accused SD2) gave sworn evidence in support of their defence and no other witnesses were called. Before considering the defence of both the accused it is necessary to state the duty of the court at the end of the defence case. At the end of the case for the defence in accordance with s. 173(m) of the Criminal Procedure Code, the duty of the court is to consider all the evidence adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. In *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 it was stated as follows:

> In considering all the evidence adduced, it is important to bear in mind that the onus of proof of guilt always rests with the prosecution and never shifts to the accused (*Wong Sieng Ping v. PP* [1967] 1 MLJ 56). All the accused had to do is to raise a reasonable doubt on the case for the prosecution. He need not prove his innocence nor convince me of the truth of his story. All that he has to do is to show that his defence might reasonably be true or probable so as to raise a reasonable doubt on the prosecution's case (See: *Mohamad Radhi b Yaakob v. PP* [1991] 3 MLJ 169).

[41] Very briefly the issues advanced by the first accused in his defence are as follows:

(a) he had no knowledge that the statements contained in the fourth quarterly results presented at the audit committee meeting on the 14 February 2007 contained misleading statements on the following reasons:

(i) the briefing given by the external auditors on 14 February 2007 was a casual briefing and a request for assistance to obtain the necessary documents to complete the statutory audit;

(ii) Khiudin convinced them there was nothing for the audit committee to brief the BOD the next day as the briefing given by the external auditors was a request for assistance to obtain documents;

(iii) after deliberating over the external auditors briefing the audit committee instructed Khiudin to immediately do the necessary to ensure that TGB's relevant departments assist the external auditors;

(iv) the audit committee was trying their level best to ensure that the external auditors received the documents needed to complete their audit and the audit committee was waiting for the external auditors to forward to them the list of documents required to satisfy the external auditors queries as to the reasonableness of the transactions;

(v) without verifying the matters raised by the external auditors the first accused cannot be said to have knowledge that the statements were false or misleading and that the task of verifying the matters raised by the external auditors was delegated to Khiudin; and

(vi) the external auditors had also not given anything in writing to the audit committee;

(b) the act of the first accused alone to recommend to the BOD that the fourth quarterly results be approved is not sufficient to constitute the act of authorising the furnishing of the statement to Bursa Malaysia on 15 February 2007 as it was announced only after the whole BOD approved the fourth quarterly results;

(c) Exhibit P14, the formal minutes of the 14 February 2007 audit committee, cannot be considered as evidence of the first accused's knowledge that the financial statements were misleading on the following reasons:

(i) they were prepared well after the BOD's meeting on the 15 February 2007;

(ii) Lo Chok Ping's statement (exh. P96) show that the first accused had informed Lo Chok Ping of the matters raised by the external auditors on the 14 February 2007 only to be interrupted by Khiuddin;

(iii) it was Khiudin and not the first accused who had asked SP8 not to minute the matters raised by the external auditors in exh. P14; and

(iv) SP8 is an untruthful witness;

(d) the subsequent conduct of the first accused in constantly and directly monitoring the finance department and asking for updates, calling for an urgent BOD's meeting on 27 April

2007 at 9pm, liaising with external auditors and Moores & Rowland and his efforts in trying to get Loh Chok Ping to sign a written confession negates his knowledge of the fact that the fourth quarterly results contained misleading statements; and

(e) the prosecution has failed to tender the financial papers discussed during the 14 February 2007 audit committee meeting and the BOD's meeting on the 15 February 2007 but instead merely relied on exh. P13 which is the announcement by Bursa Malaysia.

[42] The second accused raised the following issues in his defence:

(a) the prosecution failed to prove beyond reasonable doubt that the second accused knew on 15 February 2007 that the statement contained in the fourth quarterly results presented at the audit committee meeting on the 14 February 2007 was false or misleading on the following reasons:

(i) mere suspicion that the statement contained in the fourth quarterly results was false or misleading is not enough;

(ii) the external auditors themselves did not know that the fourth quarterly results was false or misleading on the 14 February 2007 and therefore could not and did not inform the audit committee that the statement contained in the fourth quarterly results was false or misleading;

(iii) when the external auditors briefed the audit committee on 14 February 2007 the issue of the fourth quarterly results was never the focus as the external auditors were dealing with the time line to submit their audit by end of April 2007;

(iv) the second accused was an independent non-executive director who relied heavily on the accounts/finance department in respect of the preparation of the fourth quarterly results;

(v) the second accused thought it was sufficient that the first accused inform the BOD that the audit was still on going and that Khiudin had also briefed the board; and

(vi) the second accused had no intention to hide anything from the BOD;

(b) the second accused alone cannot authorise the furnishing of the statement to Bursa Malaysia on 15 February 2007 as it was announced only after the whole BOD approved the fourth quarterly results;

(c) the minutes recorded by SP8 (exh. P18) does not state that SP4 had urged the first accused as chairman of the audit committee to highlight the issues to the BOD which is to be held on 15 February 2007;

(d) the subsequent conduct of the second accused showed that he was not aware of the misleading statements in the fourth quarterly results;

(e) Deloitte's own document, exh. D70 dated 26 May 2007, showed that the unadjusted misstatements are immaterial and that they believed that the financial misstatements were not materially misstated. This shows that even in May 2007 the external auditors believed that the financial statements were not materially misstated;

(f) the sworn testimony of the second accused is consistent with his statement given to the Securities Commission (exh. D112) and demonstrates that he did not know on 15 February 2007 that the statement contained in the fourth quarterly results was false or misleading; and

(g) it was Lo Chok Ping as the chief financial officer of TGB who was responsible for the financial affairs and data of TGB and the preparation of the fourth quarterly results. Lo Chok Ping had also confessed to the BOD's on 9 May 2007 that he was responsible for the overstatement of TGB's profit which resulted in the misleading and false financial results.

Both The Accused Had No Knowledge That The Statement Contained In The Fourth Quarterly Results Presented At The BOD's Meeting On The 15 February 2007 Contained Misleading Statements

The Date 15 February 2007

[43] Both the accused testified at length that as at 15 February 2007 they had no knowledge that the statement contained in fourth quarterly results was false or misleading. Both the learned

A counsels for both the accused had strenuously argued that the prosecution has failed to prove beyond reasonable doubt that both the accused knew on 15 February 2007 that the statement in the fourth quarterly results was false or misleading. Learned counsel, Mr Tan Hock Chuan submitted that the date,
B 15 February 2007, stated in the charge is an essential ingredient of the charge as that is the date the prosecution alleged that both the accused had knowingly authorised the furnishing of the statement to Bursa Malaysia. Learned counsel cited s. 153(1) of the Criminal Procedure Code and relied on the cases of *Dato' Seri*
C *Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737 and *PP v. Chettuvelu Nani* [2007] 9 CLJ 533; [2007] 6 MLJ 621 in support of his arguments. It must be pointed out that right at the outset of the hearing of this case Mr Tan Hock Chuan had very strongly objected to the adducing or tendering of any
D prosecution's evidence that transpired or was generated after the 15 February 2007. I had dismissed the learned counsel's objections on the grounds of relevancy as I found the evidence relevant to the charge. To my mind what the prosecution is required to prove as at 15 February 2007 is that the statement in
E the fourth quarterly results is false or misleading. The prosecution is not required to prove the exactitude of the false or misleading statement as at 15 February 2007. The exact amount, extent or nature of the false or misleading statement, as in this case, was only obtained after a subsequent full and thorough audit or
F investigation of the false or misleading statements was conducted. The audit or investigation of the exactitude of the false or misleading statements was undertaken after the exposure of the contra transactions and the false or misleading statement in the fourth quarterly results were announced. The subsequent evidence
G of the audit or investigation of the false or misleading statement together with the conduct of the relevant parties is therefore relevant to the charge and therefore admissible to show the exact amount, extent and nature of the false or misleading statement. Accordingly I had allowed both the prosecution and the defence
H to adduce evidence that is relevant to the charge, on the events that transpired or the evidence that was generated and gathered after 15 February 2007.

I

Casual Briefing By The External Auditors

[44] Both the accused testified at length that the briefing by the external auditors appeared to be a casual one and they had come to seek assistance on documentations in order to complete their audit.

[45] The evidence that was disclosed before me, however showed otherwise. It was shown to me that it is not normal and that it is only on very rare occasions that the external auditors meet with the audit committee. The first accused when asked during examination in chief "Is it normal for auditors to attend the audit committee meeting during the presentation of the quarterly reports?" replied that it was not normal. The second accused disclosed that in all the seven years that he was a member of the audit committee, the external auditors had only attended one meeting with the audit committee for the tabling of the quarterly results. Audit committee meetings are held four times a year. It is therefore obvious that it is on very important purpose that the external auditors brief the audit committee. As such it was very obvious to both the accused that the presence of the external auditors on 14 February 2007 was unusual. The presence of the external auditors at the audit committee meeting on 14 February 2007 where the fourth quarterly results were being tabled was certainly not a casual briefing. The external auditors had briefed the audit committee on certain very important issues that is on the contra transactions and that would affect the fourth quarterly results that was being deliberated by the audit committee.

[46] The seriousness of the meeting can be gathered from the evidence of SP8. She said that she was told by SP1 and SP4 that they were there to brief the audit committee members on a very important matter. She said "Deloitte did mention that this matter is deemed very serious and it is important to bring the matter to the board". According to her the external auditors raised the issue pertaining to the contra transactions and stated that if the evidence relating to the transactions was not obtained, this could result in the accounts of TGB being qualified. More importantly SP8 testified that after the meeting she highlighted to the audit committee the importance of bringing the matter to the BOD.

[47] Accordingly I am of the new that the briefing by the external auditors was certainly not a casual briefing or a ten minutes briefing as suggested by the learned counsels to SP4 but instead it was for a very important purpose. I am also mindful that the external auditors were represented by three senior officers of Deloitte namely SP1, SP4 and Mr Robert Tan at the meeting. SP4 had explained that when unaudited quarterly accounts are prepared, the external auditors are not required to attend the audit committee meeting and that they usually appear only at the end of the audit. I have no reasons to disbelieve SP1, SP4 and SP8 on this issue. They appeared to me to be credible and impartial witnesses.

No Details Were Provided At The Briefing By The External Auditors

[48] Both the accused testified at length that no details were provided during the briefing with the external auditors and there was also no written memorandum setting out the details of the audit issues.

[49] What transpired during the 14 February 2007 audit committee meeting is explained very clearly and in detail by SP4 and it is strongly corroborated by SP1 and SP8. SP1, SP4 and SP8's oral testimony is strongly reflected in the documentary evidence (exhs. P12 and P18). Exhibit P18 is the transcript of SP8's hand written notes which she had taken down in exh. P76. Be that as it may, the first accused in cross-examination had agreed that based on his recollections except for a couple of things left out in exh. P18 the minutes are fairly accurate. Exhibit P12 sets out the points of the briefing by SP4 and this proves that detailed information on the contra transactions was given orally to the audit committee by the external auditors. Exhibit P18 also reflects substantially what is reflected in exh. P12. The salient points set out in exh. P12 confirmed orally by SP4 and SP1 are as follows:

(a) the auditors were not satisfied with the evidence provided so far in relation to the transactions;

(b) that they had selected ten debtors with revenue to them amounting to USD50 million during the year and an outstanding amount of USD37 million;

(c) that there had been no confirmation reply received from these debtors on the balancing outstanding; A

(d) that the debtors paid on behalf of TAS for the purchase of property, plant and equipment amounting to USD11 million;

(e) that the auditors had conducted a company search on these companies and the result show's that these debtors were dormant companies with a share capital of RM2 and having common nominee directors and shareholders; B

(f) that all these arrangements appear to be very unusual and lack commercial justification; C

(g) in a worst case scenario the auditors would issue a qualified audit opinion on the financial statement of TGB;

(h) the quarterly announcement of TGB needs to be made by 28 February 2007 and the audited results need to be issued by 30 April 2007; D

(i) the announced results cannot deviate significantly from the audited results. There can be further adjustments arising from their audit test and these adjustments may be material; and E

(j) SP8, May Tan, the company secretary represented that what was discussed at the audit committee meeting would be brought to the attention of the BOD's meeting the next day. F

[50] The defence also streneously challenged what actually was briefed by the external auditors to the audit committee on 14 February 2007 and argued that there are inconsistencies between exhs. P12 and P18. Having compared exhs. P12 and P18 I do not find the differences to be material or significant. There are no material inconsistencies between exhs. P12 and P18 and the oral testimonies of SP1, SP4 and SP8. To my mind the differences are inconsequential. In any event exhs. P12 and P18 reflect the oral testimonies of SP4, SP1 and SP8. In order to appreciate these findings it is necessary for me to set out the relevant parts of SP1 and SP4's evidence. SP1's oral evidence in chief is as follows: G H

> On 14.2.07, we attended the Audit Committee meeting. During the meeting we informed the Audit Committee that our audit for financial year ended 31.12.06 had not been completed because we have found certain transactions which we have not been able to I

receive satisfactory evidence. We described to Audit Committee the nature of this transactions as described earlier in this court, the contra transactions. We told Audit Committee, if eventually we did not receive satisfactory evidence from the management, we may have to issue a qualified Audit Opinion on the financial statement of Transmile Group Berhad. And upon resolution of these issues, the significant adjustments may be required to be made to the Financial Statement of Transmile Group Berhad. We reminded the Audit Committee that the date line for Transmile to make 4th Quarter announcement to Stock Exchange is on 28.2.07. The due date for the issuance of audited statements is on 30.4.07. And the results contained in 4th Quarter announcement cannot deviate significantly from the result in the audited financial statement. Therefore we ask the Audit Committee to look into this matter reported to them and revert to us.

From Deloitte, Robert Tan, Jimmy and myself attended. From Transmile, the members of Audit Committee and company secretary of Transmile Group Berhad attended. The Audit Committee is Jimmy Chin, Shukri and En. Khiudin.

In cross-examination SP1's evidence is as follows:

Q: Audit Committee only informed of actual findings subsequently to 14/2 in detail?

A: Not correct.

Q: You informed them in detail?

A: We informed Audit Committee the nature, the amount of transactions involved and the number of debtors involved.

...

Q: Main reason why Deloitte wanted to attend was to report to Audit Committee that documents not forthcoming from financial department and Loh Chok Ping?

A: No, that is not the main reason.

Q: Agree: as at 14.2.07 Deloitte was not in a position to determine whether unaudited report true or accurate or false or misleading?

A: Yes.

Q: When Deloitte attended meeting on 14/2, Deloitte not in position to advice Audit Committee, that is, report not true or misleading on the unaudited Quarterly Result?

A: True.

Q: That's why Deloitte did not report or advice Audit Committee on 14/2, that unaudited report not true or not accurate or false?

A: I disagree.

...

Q: When Deloitte informed Audit Committee, audit not finalised at that meeting, this meant Deloitte on that date did not know whether unaudited 4th Quarter result were true false or misleading?

A: I disagree.

Q: Put: as at 14.2.07, Deloitte did not know as a fact that the unaudited 4th Quarter result were true false or misleading?

A: I disagree.

Q: Put: when you informed the Audit Committee audit not finalised, in so far as Audit Committee members concerned as at that date 14.2.07, they were not informed unaudited 4th Quarter result were false or misleading?

A: I disagree.

Q: Deloitte did not inform Audit Committee on 14.2.07 that unaudited 4th Quarter results were false or misleading?

A: We did not say misleading.

Q: Did not say false?

A: We did not say that.

...

Q: Put: the main purpose of Deloitte's attending on 14.2.07 was to seek Audit Committee's assistance to ensure that the management, that is the financial department, renders assist to external auditors?

A: Not main purpose.

Q: One of purpose?

A: Yes.

...

Q: Your purpose of bringing up to Audit Committee was to stop announcement because you know the unaudited 4th Quarter result will be bought up next day?

A: Yes.

Q: Your intention, these 4th Quarter result should not be approved by Board of Directors?

A: No, whether result approved by Board of Directors is not my concern.

Q: Your intention of 14/2 Audit Committee meeting for matter to be brought up?

A: As an auditor I am fully aware of the responsibilities of auditors and I am fully aware of responsibility of Audit Committee and my intention of asking to attend 14/2 meeting, main objective to highlight unusual contra transactions to Audit Committee so that they take into consideration when review and approve the 4th Quarter announcement. So it is my duty to bring it up and it is duty for Audit Committee to bring up and report to Board of Directors.

...

Q: Put: briefing given by Deloitte to Audit Committee members was focused on Audit Committee's assistance to get financial department or management to co-operate and forward documents to you?

A: That was not the focus of briefing.

...

Q: Put: if the audit was not completed by 14/2 and Deloitte was not in position to determine whether unaudited 4th Quarter result true or false or misleading the members cannot be expected to know unaudited 4th Quarter result were true, false?

A: I disagree.

In re examination SP1 said:

> Audit Committee on 14/2, the focus was not on obtaining documents. The focus was to highlight to the Audit Committee these contra transactions. I have defined the contra transactions from day one of my evidence. These contra transactions were brought up to the Audit Committee. After we found this transactions we were very concerned because of the nature and size of transactions, therefore we found it was important for us to report to Audit Committee.
>
> Yes I considered these to be very serious issues.
>
> Yes we did provide a detailed explanation to the Audit Committee of these issues. The details are set out in P12.
>
> We did not put it in writing, because we found that the briefing we had with Audit Committee was to report this transactions to be clearly communicated what we intended to communicate to Audit Committee because that was meeting involved interaction between Deloitte and Audit Committee. In the circumstances we found the matter can be communicated in the meeting so not necessary to put it in writing.

SP4's during his evidence in chief said:

> Yes I know why Audit Committee meeting on 14.2.07. One of the agenda is to review the quarterly announcement. Yes I was aware part of the agenda on 14.2.07 was the review the quarterly announcement.
>
> It is part of responsibility of Audit Committee to review the quarterly result for purposes of announcement and to report to the board.
>
> ...
>
> Firstly we told Audit Committee that the audit has not been finalized as certain test had yet to be completed. We were not satisfied with the evidence obtained so far.
>
> We told Audit Committee that there are certain additions to property, plant and equipment amounting to USD11 million that were paid on behalf by certain debtors of Transmile. These involved 10 debtors whose revenue transacted with these 10 debtors amounted to USD50 million. The balance as of 31.12.2006 from these 10 debtors amounted to USD37 million. We carried out a search on these debtors, we noted that they

A shared the same registered office, certain of these companies have common company directors and shareholders with RM2.00 paid up capital and are dormant. We also informed Audit Committee that we have not received any confirmation on the amount outstanding that we sent out. We sent out to these 10 customers.

B We told Audit Committee that these transactions are very unusual and lack commercial justifications.

We told Audit Committee that we had discussion with management on this matter and they (management) informed us they will provide us with document and information's.

C

We further told Audit Committee that in the worst case scenario that could be qualifications on the financial statement in the event that we are not satisfied with audit evidence. We told Audit Committee that the company has until 30.4.07 to file a copy of

D audited financial statement. The results which they announce cannot deviate significantly from the audited results. And there could be material adjustments resulting from our audit tests. We requested Audit Committee to look onto this matter and deal with it.

E And May Tan informed that what we discussed would be brought up to board meeting the next day.

…

Yes when I mentioned to Audit Committee on 14.2.07 I was very

F clear of the concerns of the suspicious transactions.

Yes the unusual transactions did contribute certain amount of revenue to Transmile Quarterly result. This Fourth Quarterly Result was to be announced on 15.2.07.

G When we explained to Audit Committee on the audit findings, it was based on the unaudited management account of Transmile Group.

Yes we made it clear to the Audit Committee of the consequences of these accounts that contained these revenue figures.

H

Accounts to be qualified means that Audited Report contained certain reservations on certain account balances and transactions which will not give a true and fair view on the financial statement.

For the accounts to be qualified it is a serious matter. We

I explained to the Audit Committee what the qualification means.

The Audit Committee noted what we had briefed them. No they did not offer any explanations.

The Chairman of Audit Committee on that day was Okt 1. Other then 'noted' not much response. No material response of Okt 2 at the meeting.

I would expect them to carry out an investigation as there are sufficient grounds based on our findings.

In cross-examination SP4's evidence is as follows:

Q: Refer P12. On the meeting on 14.2.07, agree your testimony verbatim of what is recorded in P12?

A: It is reflective of what I say.

Q: P12 page 2 bullet 1 (reads). Oral testimony, told Audit Committee transaction unusual and lack commercial justifications. Verbatim?

A: Yes.

Q: Next bullet (Reads). Oral testimony, told Audit Committee that we had session with management and management provide info and document, Almost identical?

A: Yes.

Q: Next bullet (Reads). Oral testimony, told Audit Committee worst case scenario could be qualification. Reflective word for word?

A: Yes.

Q: Did you memorise this minutes by hard?

A: No. Because these were the few key points at the Audit Committee and these were the words used.

Q: Tell the court, this minutes prepared by Stanley or you?

A: When I was briefing Audit Committee, Stanley took down notes and I reviewed it after that.

...

Q: Did Deloitte seek Audit Committee's assistance to get financial department to provide necessary documents during that meeting?

A: We raised our concern of the unusual transactions and ask Audit Committee to review these matters and deal with it. So what we are asking is there are grounds for investigations of matters brought up. There are uncertainties surrounding those accounts affected by contra transactions. That was our concern.

Q: Your purpose, to tell Audit Committee please investigate?

A: Yes.

...

Q: Apart from informing Audit Committee on worst case scenario accounts qualified, other consequences that can befall Transmile?

A: We also informed the Audit Committee that Audited results cannot deviate significantly from unaudited quarterly announcement. So an accurate announcement has to be made to Bursa Malaysia.

Q: Did you at any point of time tell the Audit Committee that in the event deviation was significant the unaudited accounts announced could be deemed misleading, not true or false?

A: At that point we had concerns on the results based on work done. We had not concluded the work so we do not know at that point whether correct or incorrect but we do have concerns at that point of time.

Q: You said worst case scenario accounts qualified. Agree: did not mean unaudited announcement would probably be qualified at that point of time?

A: If we were to ask to sign off that accounts, we would probably qualify the accounts at that point of time.

Q: Agree: the concern was due to lack of document and explanation by Loh Chok Peng?

A: No.

...

Q: Agree: Deloitte on 13/2 had already obtained SSM search results on 10 companies, search results for 10 companies also not furnished to Audit Committee on 14/2.

A: Yes but the findings were reported to them.

Q: Why SSM search results not furnished to Audit Committee? A

A: Because that is part of documents to support our own audit work and we have reported that to Audit Committee based on these documents. Unless they request for it, normally we would not gave them. However we did show search results to CFO on 13.02.2007. B

...

Q: You said, you urged Okt 1 the matters be highlighted to Board. Remember?

C

A: Yes.

Q: Agree, this was done when you first started briefing?

A: Based on my recollection, yes.

D

Q: Instructions: Deloitte was asking Audit Committee to consider informing Board of Director of the discovery by Deloitte as regards contra transactions and lack of documents?

A: As I said earlier, Audit Committee is sub committee of Board, who has oversight responsibility over conduct of audit. It is really not my duty to ask them to report to Board. But I told them to report to the Board. The objective of that meeting that day was to highlight our concerns on our findings and request them to look into the matter. E

Q: Agree: Audit Committee did give directions to management to assist Deloitte in every possible way with requests to documents and explanation? F

A: When?

... G

Q: Your main concern was to impress lack of documents to complete audit?

A: Not the only concern.

H

Q: Main reason?

A: Main reason is surrounding the contra transactions.

Q: What is that is lack of documents?

I

A: No, as well as unusual nature of transactions.

Q: Lack of documents one of reasons?

A: Yes.

...

Q: At meeting about 10 or 15 minutes?

A: Cannot remember how long.

Q: Minutes does not say time?

A: No.

Q: Suggest: 10 to 15 minutes?

A: No longer than that.

Q: Instructions: 10 to 15 minutes?

A: No.

...

Q: As of 14/2/2007, Deloitte not in position to confirm the unaudited results true, false or misleading because audit not completed.

A: No. There were sufficient grounds to show they are incorrect.

Q: You did not inform Audit Committee, the accounts are misleading, not true or false.

A: No.

In re-examination SP4 said:

ID18 para 3, because we were not required to issue our audit opinion on 14.02.2007 and audit was on going and the company had until 30.04.207 to issue a set of audited accounts so that is why I said not definitely a qualified report. I confirm that we told the Audit Committee that the audit is not yet completed and we were not satisfied with the documents and information provided to us so far and therefore we asked the Audit Committee to look into these matters. And there are sufficient grounds to know there are uncertainties surrounding those figures contained in the report.

I said probably qualify the account if asked to sign at that time is because we were not satisfied with audit evidence that we obtained on the validity over the contra transactions. Those amounts involved were very material to the financial statements. So in cases where the auditors are not satisfied on the validity of those accounts balances and transactions a qualified audit opinion would be issued.

...

On search results not given to Audit Committee members on 14/2, we did discuss the search results on the 10 companies with the Audit Committee members.

Through not my duty to tell Audit Committee to report to Board of Directors but I still did. The Audit Committee is sub committee of Board and they are people charged with governance. I went to Audit Committee that day to raise our concerns and asked them to look into our concerns that we raised. I would expect the Audit Committee as a sub committee of Board to report the same to the Board. So by the way I was brave, I also told them to report to the Board.

...

The audit issues raised to Audit Committee on 14/2 were important matters. I did ask Chairman of Audit Committee to report this matter to Board. The company secretary response was that what was discussed at Audit Committee would be brought up to Board and that was in response what we told the Audit Committee. It is set out in P12 at last point at page 3 the Audit Committee meeting.

[51] Having heard SP1, SP4 and SP8 and having seen their demeanour I find them to be credible witnesses. They were subjected to lengthy cross-examination but they remained consistent and unshaken throughout their evidence. SP1 and SP4 appeared to me to be very professional in their area of work. SP1, SP4 and SP8 have no reason to lie. I accept the prosecution's version that both the accused were provided with sufficient information and knowledge as appearing in their oral evidence and exhs. P12 and P18 including that the contra transactions which forms part of the fourth quarterly results appeared to be very unusual and lack commercial justification and that in a worst case scenario the auditors would issue a qualified audit opinion on the financial statement of TGB. They were also informed of the suspicious debtors who paid on behalf of TAS for the purchase of property, plant and equipment amounting to USD11 million and that the external auditors had conducted a company search on these companies, with the result showing that these debtors were dormant companies with a share capital of RM2 and having common nominee directors and shareholders. They were also told to bring this matter to the attention of the BOD the next day.

SP8 when asked "can you confirm that SP4 urged the first accused to highlight the matter to the attention of the board?" Her answer was "Yes". SP8 also added that "after the meeting I highlighted the importance of bringing the matter to the board". SP4 in his oral testimony also confirmed that he had urged the first accused who was the chairman of the audit committee, to highlight the matter to the attention of the BOD.

The External Auditors Were Not In A Position To Determine Whether The Unaudited Fourth Quarterly Result Was Not True, False Or Misleading And Did Not Inform The Audit Committee That The Accounts Not True, False Or Misleading

[52] Both the learned defence counsels, submitted that at the material point of time that is on 14 February 2007 and 15 February 2007, the external auditors had not determined whether the fourth quarterly results was false or misleading as their audit was still on going. Mr Tan Hock Chuan, referring to SP1's evidence during cross-examination submitted that as at 14 February 2007 the audit has yet to be finalised and that until the draft auditor's report (exh. P19A) was prepared on 27 April 2007, the external auditors were still on a fact finding mission that is, they were still looking for documents. He submitted:

(a) SP1 during cross-examination confirmed that until March 2007 the audit was still on going and they were still trying to get the documents for the contra transactions up until the draft auditor's report;

(b) SP4 too during his cross-examination confirmed that as of 14 February 2007, the audit committee's meeting, they have yet to complete the audit and they informed the audit committee on the lack of documentation and for the management to provide the documents;

(c) SP4 confirmed that after the audit committee's meeting on 14 February 2007, they did receive the documentation from the management;

(d) SP4 confirmed that the draft auditor's report was only finalized on 27 April 2007;

(e) SP1 during cross-examination admitted that they were not in the position to inform the audit committee during its meeting on 14 February 2007 that the unaudited fourth quarterly

results was not true, false and misleading and they also did not tell the audit committee to stop the announcement or advise the audit committee to bring the matter to the BOD on the 15 February 2007;

(f) both the minutes of Deloitte (exhs. P11 and P12) and Deloitte's letter to the audit committee dated 16 March 2007 (exh. P16) also did not state that Deloitte informed the audit committee to bring up the audit issues to the BOD;

(g) SP4 during his cross-examination admitted that they did not tell the audit committee that the unaudited fourth quarterly result for TGB for 2006 would definitely be qualified;

(h) SP4 confirmed during the cross-examination that they did not inform the audit committee that the account was false and to inform the BOD not to release the unaudited fourth quarterly result;

(i) SP4 agreed that the audit committee would not know that the account was false and misleading;

(j) SP4, confirmed that as at February 2007, Deloitte was still not certain that the unaudited fourth quarterly results was false and misleading;

(k) since the audit was still ongoing as at 26 May 2007, and especially where exh. D70, Deloitte's audit memorandum dated 11 May 2007, had concluded that the unadjusted misstatements were not material and believed the financial statements were not materially misstated, how can the first accused and the second accused as members of the audit committee, know more than three months earlier that is on 15 February 2007 that the unaudited results were misleading or false; and

(l) since the external auditors did not brief the audit committee on their alleged finding in respect of the contra transactions in detail the audit committee was not in the position to determine the seriousness of the issues and was also not in a position to advise the BOD to stop the announcement of the fourth quarterly results to Bursa Malaysia.

[53] Mr Tan Hock Chuan further submitted that it is reasonable to infer that the main purpose for the external auditors to attend the audit committee's meeting on 14 February 2007 was to seek the audit committee's assistance to get the documents from the management. He added SP1 during cross-examination agreed that one of the purposes the external auditors attended the audit committee's meeting on 14 February 2007 was to seek the audit committee's assistance to get the documents and he also agreed that the lack of documentation was an important matter to Deloitte.

[54] The learned counsel also referred to the evidence which showed that Deloitte had three meetings with Lo Chok Ping that is, on the 8 February 2007, 12 February 2007 and 13 February 2007 that is prior to the audit committee's meeting and submitted that SP4 agreed that they requested the audit committee's assistance because they did not get the documents from Lo Chok Ping.

[55] The defence also submitted that the ten companies search results obtained by Deloitte on 13 February 2007 and relied on by Deloitte to conclude that the transactions involved were unusual at that time were also not conclusive as both SP1 and SP3 during their cross-examination agreed that it is possible that the companies can still be active and not be dormant where no information is filed by the company secretary. However there is not a shred of evidence produced by the defence to show that the companies were active and not dormant.

[56] The defence pointed out that after the audit committee's meeting on 14 February 2007, Deloitte only wrote and sent a letter for the first time to the audit committee *vide* their letter dated 16 March 2007 (exh. P16) which was received by the audit committee on 20 March 2007. This was confirmed by SP1 even though SP1 had explained that the delay was because of the Chinese New Year break. The defence however submitted that if the alleged audit issues were so serious or that Deloitte had known the unaudited accounts were false or misleading on 14 February 2007, Deloitte would have followed up with the audit committee immediately and not wait till March 2007. According to the learned counsel the conduct of the external auditors clearly supports the proposition that even until 16 March 2007 they was not certain that the unaudited accounts were false or misleading

as they were still on a fact finding mission. On this issue I accept the prosecution's explanation for the delay since the external auditors had done their part of highlighting the contra transaction issues to the audit committee but despite that the announcement was still made on 15 February 2007 and there was a long Chinese New Year break after that.

[57] In short both the learned counsels relying on the evidence of SD1, SD2, SP1 and SP4 argued that the external auditors did not expressly tell the audit committee that the accounts were not true, false or misleading.

[58] To my mind it is not necessary for the external auditors to expressly use the terms "not true, false or misleading" in their briefing to the audit committee. What is required is that, did the briefing as a whole by the external auditors on the 14 February 2007 raised serious issues which tantamount to providing information and knowledge to the audit committee that the statement in the fourth quarterly results is false or misleading. I am fully mindful that SP4 said that they did not inform the audit committee that the accounts were not true, false or misleading because at that time the audit was not finalised and they were not required to issue an audit opinion on that day. However based on what was briefed to the audit committee members on 14 February 2007, SP4 was able to state that the audit committee members would not be able to state that the accounts were accurate on that day. I am satisfied that based on SP1, SP4 and SP8's evidence supported by exhs. P12 and P18 the contra transactions were explained to both the accused. It is very obvious that the contra transactions which formed part of the fourth quarterly results appeared to be very unusual and lacked commercial justification. Both the accused were informed of the suspicious debtors who had paid on behalf of TAS for the purchase of property, plant and equipment amounting to USD11 million and that the external auditors had conducted a company search on these companies and the results showed that these debtors were dormant companies with a share capital of RM2 and having common nominee directors and shareholders.

[59] The audit committee was also informed that the amounts involved were significant. The revenue from the ten debtors selected by the external auditors amounted to USD50 million. This is no doubt a huge amount as when it is converted it amounts to

A RM175 million. The outstanding amount involving these debtors was also not a small sum, that is, USD37 million. Though there appeared to be collections involved, amounting to USD11 million the external auditors found the contra transactions to be very unusual and lacked commercial justification.

B

[60] The audit committee was also told to bring this matter to the attention of the BOD the next day. This too showed the seriousness of the issues raised by the external auditors. SP1's evidence reads:

C

> I cannot remember that the Audit Committee said they will bring this up to the Board of Director. That certainly is the expectation by virtue of responsibility tasked on the Audit Committee.

SP4's evidence on this issue reads:

D

> Q: This statement by company secretary was done before meeting ended?
>
> A: Because I remember, I asked her whether what was discussed be bought to the board she said yes.

E

> Q: You agree: Audit Committee members did not inform that they will bring matter to Board?
>
> A: No.

F

> ...
>
> ID18 para 3, because we were not required to issue our audit opinion on 14.02.2007 and audit was on going and the company had until 30.04.207 to issue a set of audited accounts so that is why I said not definitely a qualified report. I confirm that we told
G the Audit Committee that the audit is not yet completed and we were not satisfied with the documents and info provided to us so far and therefore we asked the Audit Committee to look into these matters. And there are sufficient grounds to know there are uncertainties surrounding those figures contained in the report.
>
H I said probably qualify the account if asked to sign at that time is because we were not satisfied with audit evidence that we obtained on the validity over the contra transaction. Those amounts involved were very material to the financial statements. So in cases where the auditors are not satisfied on the validity of those
I accounts balances and transactions a qualified audit opinion would be issued.

> We asked the Audit Committee to look into the matters and deal with it. We are referring to the contra transactions.
>
> On search results not given to Audit Committee members on 14/2 we did discuss the search results on the 10 companies with the Audit Committee members.
>
> Through not my duty to tell Audit Committee to report to Board of Director but I still did. The Audit Committee is sub committee of Board and they are people charged with governance. I went to Audit Committee that day to raise our concerns and asked them to look into our concerns that we raised. I would expect the Audit Committee as a sub committee of Board to report the same to the Board. So by the way I was brave also told them to report to the Board.
>
> ...
>
> The audit issues raised to Audit Committee on 14/2 were important matters. I did ask Chairman of Audit Committee to refer this matter to Board. The company secretary response that what was discussed at Audit Committee would be brought up to Board and that was in response what we told the Audit Committee. It is set out in P12 at last point at page 3 the Audit Committee meeting.

[61] Having considered SD1, SD2, SP1, SP4 and SP8's evidence I am of the opinion there was sufficient evidence to trigger both the accused who are the audit committee members with the knowledge that the contra transactions which formed part of the statement in the fourth quarterly results was false or misleading. As such I disagree with the learned counsels submissions that the audit committee was not in a position to determine whether the unaudited fourth quarterly result was not true, false or misleading. The external auditors had given them sufficient details to show that the financial statement was misleading.

No Written Memorandum Was Given By The External Auditors To The Audit Committee

[62] The first accused argued that no memorandum in writing was given to the audit committee to reflect the seriousness of the contra transaction issues. The short answer to that is that, there is no requirement that such a memorandum in writing is required to be given. I am satisfied that the briefing by the external auditors on the points listed in P12 and P18 was serious enough and

served as sufficient notice to the audit committee. I accept SP1 explanation of this issue when during re-examination he said as follows:

> Yes we did provide a detailed explanation to the Audit Committee of these issues. The details are set out in P12.
>
> We did not put it in writing, because we found that the briefing we had with Audit Committee was to report this transactions to be clearly communicated what we intended to communicate to Audit Committee because that was meeting involved interaction between Deloitte and Audit Committee. In the circumstances we found the matter can be communicated in the meeting so not necessary to put it in writing.

Was The Briefing By The External Auditors On 14 February 2007 Only To Request For Documents?

[63] Both the accused very strenuously testified that the briefing by the external auditors to the audit committee on 14 February 2007 was only related to their need for documents and evidence to complete their audit.

[64] Having considered all the evidence I am of the view that the request for documents was only part of the briefing. I accept SP1 and SP4's evidence where they clearly maintained throughout their evidence that on 14 February 2007 the main issue was that of the contra transactions which were very unusual and lacked commercial justification and that the insufficiency of documents was not the main issue. SP1 and SP4's evidence is supported by SP8. SP8 disagreed when she was asked whether what the external auditors wanted the audit committee to inform the BOD was in relation to documents required by the external auditors to finalise the audit by end of April. SP8 added, "the main thing is about the trade debtors and these transactions and they were not even highlighted to the board of directors."

[65] SP1, SP4 and SP8's evidence is also reflected in exhs. P12 and P18 which clearly emphasised the contra transactions instead of a request for documents. Exhibits P12 and P18 showed that the contra transactions were very unusual, lacked commercial justification, that it was a serious matter and could result in the accounts being qualified. I accept SP1's evidence which is as follows:

> Yes the Audit Committee Meeting held on 14.2.07 is captured on page 1 and 2 of P12.

Based on P12, we informed Audit Committee that audit had not been completed because certain testing has not been completed because management not able to provide us with satisfactory evidence. We briefed Audit Committee of nature of contra transaction. We told them of the 10 debtors we found transaction with Transmile. Transmile providing air services cargo to these 10 customers with revenue amounting to US50 million. As at year end, the amount outstanding was USD37 million.

No confirmation reply on the balance outstanding has been received from these debtors. We noted these debtors paid on behalf of Transmile Air Services for the purchase of fixed assets by Transmile Air Services amounting to USD11 million. We conducted company search on these company and our search result shows these debtors are dormant which share capital of RM2.00.

We highlighted to Audit Committee that these arrangements appear to be very unusual.

Reads P12 - minutes dated 14.2.07. We did emphasis the potential consequences. One would be the qualified audit opinion of financial statement of Transmile Group Berhad. Second would be, there may be significant adjustments that are required to be made to Transmile Group Berhad.

When I explained to Audit Committee, they appeared to me that they understand the consequences.

[66] I am therefore of the opinion that the external auditors briefing's main purpose was not to seek further documents from the company but to highlight the concerns of the contra transactions which formed part of the fourth quarterly results.

The Audit Committee Instructed That The Management And The Finance Department To Provide Documentation And Explanation To The External Auditors

[67] Both the accused in their sworn evidence stated that the audit committee would not have the time to find out the alleged audit issues that is the contra transactions raised by the external auditors in the audit committee's meeting on 14 February 2007 as the BOD's meeting was on the morning of the next day that is, 15 February 2007. The defence pointed out that despite the lack of time, the audit committee still carried out their duty and responsibility where they directed the management to provide Deloitte with the necessary documents. SP8 confirmed during cross-examination that after Deloitte's briefing at the audit

committee's meeting on 14 February 2007, the audit committee discussed the issues raised by the external auditors and the first accused asked Khiudin to look into the matter. SP8 also confirmed that the audit committee also informed Deloitte at the audit committee's meeting on 14 February 2007 that they would get Lo Chok Ping and the Finance Department to provide the documents.

[68] Both the accused explained that the purpose the external auditors attended the audit committee's meeting on 14 February 2007 was to seek the audit committee's assistance to get the documents. They said that the lack of documentation was an important matter to the external auditors. They added that SP4 in cross-examination confirmed that the external auditors did receive the documentation from the management subsequently after the audit committee's meeting. SP4 had admitted in cross-examination that they sought the audit committee's assistance because they did not receive the documents from Lo Chok Ping even though they had three meetings with Lo Chok Ping prior to the audit committee's meeting.

[69] The defence also pointed out that SP8 during her cross-examination confirmed that the first accused did inform the BOD on 15 February 2007 that there were still some documents required and the audit was still on going during the BOD's meeting on 15 February 2007.

[70] I do not accept that the audit committee had instructed the management and the finance department to provide documentation and explanation to the external auditors as a defence. It is not disputed that the external auditors had asked for the necessary documents regarding the contra transactions. The main issue however was not the issue of documentation but regarding the lack of justification of the contra transactions which were found to be very unusual and lacked commercial justifications. SP4 emphasised throughout his evidence that the main focus was not on the documents but the unusual contra transactions. As such, the mere fact that the audit committee had instructed the management and the finance department to provide documentation and explanation to the external auditors does not in any way exonerate the audit committee from raising these serious contra transaction issues to the BOD on the 15 February 2007. Both the accused had wilfully withheld these serious issues from the BOD on 15 February 2007.

Both The Accused Were Independent Non-Executive Directors Who Relied On Khiudin And The Finance Department In Respect Of The Preparation Of The Fourth Quarterly Results

[71] It was submitted that both the accused were independent non-executive directors of TGB and they were not employees of TGB. As such they were not involved in the day to day affairs of the company and for the preparation of the fourth quarterly results.

[72] It was also submitted that the second accused does not have any accounting background. He is not in the accounts/finance department of TGB. As such, he would have to rely heavily on the accounts/finance department in respect of the preparation of the unaudited fourth quarterly results. Learned counsel for the second accused cited the excerpt from Loh Siew Cheang's book entitled "*Corporate Powers Accountability*", Second Edition, (exh. D87) which was agreed to by SP9. It reads as follows:

> The position of an 'independent director' is a difficult one. In all cases he is 'forced' to rely upon the executive directors as well as senior officers for information about the affairs of the company. To this extent, the degree of trust they must necessarily place upon these people becomes more acute, since they are not in constant touch with management. Their participation is at periodic board meetings and their depth of connection with the affairs of the company is very much dependent upon the quality of information that is contained in board papers of reports given to them. Generally, the law shows greater sympathy to such category of directors as long as they have demonstrated some degree of care, skill and diligence as may be reasonably expected of them in circumstances in which they find themselves.

[73] I am aware that SP6 also agreed that non-executive directors are forced to rely on the executive directors and the senior officers of the company for the affairs and information of the company because they are not in the company. SP6 also agreed that non-executive directors have to rely on the documents, minutes and papers presented by the management of the company as without the assistance of the management of the company independent directors would be handicapped on the details of the company. This was also confirmed by SP8 in her cross-examination.

[74] I am also aware that Lo Chok Ping who was the Chief Financial Officer of TGB at that material time was responsible for the financial affairs and data of the company and he was mainly responsible for the preparation of the fourth quarterly results. SP6 also confirmed that Lo Chok Ping who was the Chief Financial Officer of TGB at that material time was responsible for the financial affairs and data of the company and one of his responsibilities was to prepare and maintain a proper set of financial accounts. Both SP1 and SP4 also agreed that TGB's accounts were prepared by the Finance Department of TGB.

[75] The defence argued that based on the minutes of the audit committee's meeting on 14 February 2007 (exh. P14), Lo Chok Ping did not brief the audit committee on the alleged audit issues raised by the external auditors to him earlier. He also did not inform the audit committee that he had met up with them prior to the meeting. According to SP1, the external auditors had three meetings with Lo Chok Ping requesting for the documents. Neither the external auditors nor Lo Chok Ping had informed the audit committee about these meetings. I disagree that the external auditors did not brief the audit committee of their meetings with Loh Chok Ping as both SP1 and SP4 testified that they did inform the audit committee of their meetings with the management and by management this would include Loh Chok Ping. The external auditors meeting with the management is also reflected in exh. P12.

[76] It was also submitted that based on the minutes of the BOD's meeting on 15 February 2007 (exh. P15), Lo Chok Ping did not brief the BOD on the alleged audit issues on the contra transactions raised by the external auditors earlier even though he was invited to brief the BOD on the financial results and after his briefing, the BOD proceeded to approve the fourth quarterly results. It was pointed out that SP6 in cross-examination agreed that as the Chief Financial Officer, Lo Chok Ping ought to have briefed the BOD on the said alleged audit issues but he did not. SP6 also confirmed that the first accused as the chairman of the audit committee did not recommend to the BOD to approve the fourth quarterly results and the BOD only approved it after the briefing by Lo Chok Ping. In other words, the BOD approved it based on Lo Chok Ping's briefing. I disagree. SP6's evidence is very clear on this issue. He categorically testified that the BOD

would not have approved the fourth quarterly results if they were not recommended to be approved by the audit committee. I accept SP6's evidence on this issue.

[77] The learned counsel also highlighted that Lo Chok Ping had confessed to the BOD on 9 May 2007 that he was responsible for the overstatement of TGB's profit which resulted in the misleading and false financial results. Based on the minutes of the ninth special board of director's meeting on 9 May 2007 (exh. P82), Lo Chok Ping confessed to the BOD *inter alia* that:

> I took it upon myself to overstate profits of the group especially on the fourth quarter relating to item 2 of the financial results i.e. the addition to property, plant and equipment. That overstated amount is what the auditors found out in November and December 2006. I did all these in the interests of the company and this was discovered by the auditors in February 2007, I tried my best to cover up but no avail.

[78] In short it was submitted that as Lo Chok Ping was trying his best to cover up his act of overstating the profit of the TGB, the audit committee's members like both the accused who were independent non-executive directors were not involved in the day to day operations of the company, would not have known the audit issues without the assistance of the management/finance department. To my mind irrespective what Loh Chok Ping did it was incumbent on the audit committee to perform its own functions and duties independently of the management or even Loh Chok Ping. That is the very purpose for the establishment of an audit committee in a public listed company as explained by SP9.

[79] Both the accused in their defence also stated that they relied on Khiudin. According to the first accused at the conclusion of the audit committee meeting on 14 February 2007, the audit committee members had a discussion pertaining to the audit issues raised by the external auditors and Khiudin's response was as follows:

> ... Khiudin said what is there to tell the Board? That the auditors are asking for documents and that we are going to direct Finance department to give them all the documents. Khiudin continued, look at what they briefed us. There are insufficient documents. I think our credit control policy is not very good. There is no accusation of fraud involved here, otherwise auditors would say so. There have been collection, then I asked "any suggestion?"

A Khiudin said 'I will work with Finance department and send out written memo that they must try their very hardest to assist the auditors and we said fine. Khiudin was the only management member in Audit Committee. So he is effectively the second command in the company, the director in charge of finance and is basically Lo Chok Ping's boss. That's why Audit Committee delegated that task to Khiudin on assurance that he will have a word and send a memo out on the same day. Khiudin is director in charge of finance. That is his official designation when he signed off the annual statutory declaration as director in charge of Finance.

[80] Having considered the testimony of SD1 and SD2 and all the arguments and submissions raised by the learned counsels I am of the opinion that both the accused as independent directors had a duty to bring independent judgment to the decision making process and cannot be allowed to delegate it to others and blame an executive director for their decisions. SP9 confirmed that the audit committee must comprise of at least three members, majority of who are independent directors. SP9 also said that the chairman of the audit committee must be an independent director. The basis of this rule, according to SP9 is that the audit committee plays an important role to ensure the integrity of financial statements issued by the listed company. These financial statements are relied upon by the investing public so the figures that are provided and the information must be complete and accurate. As such, both the accused as non-executive and independent directors are rightly not involved in the day to day running of the company. They are required to be independent from the management of the company as they have specific responsibilities to perform.

[81] SP9 explained that the Bursa listing requirements in exh. P86 spelt out the responsibilities of the audit committee in para. 15.13. According to exh. P86 the audit committee must review and report to the board of director the quarterly results and year end financial statements prior to being approved by the BOD, focusing particularly on changes in or implementation of major accounting policy changes, significant and unusual events and compliance with accounting standards and other legal requirements. SP9 also confirmed that a report by auditors that more than 50% of the revenue to be disclosed in a particular quarter is suspicious or unusual would be considered a significant unusual event. She also stated categorically that if a significant or unusual event was brought to the attention of the audit

committee, it was the responsibility of the audit committee to review and report the same to the board of directors as the audit committee is, after all, a sub-committee of the board of directors.

[82] In the present case the external auditors had specifically informed the audit committee of the contra transactions and had urged the audit committee to report it to the BOD. These were serious issues. In any event the fact that the first accused had asked Khiudin "What do we tell the board?" also shows that it was a matter of significant importance such that there was something to tell the BOD in the first place.

[83] It must be pointed out that the first accused in his evidence has stated that Lo Chok Ping, had presented the fourth quarterly results to the audit committee on the 14 February 2007 meeting, after the briefing by the external auditors. Lo Chok Ping was the head of the finance department and reported to Khiudin, an audit committee member. I agree with the prosecution that the first accused evidence that he relied on Khiudin is not acceptable on the following reasons:

(a) the external auditors had urged the audit committee to report the contra transaction issues to the BOD instead of relying on Khiudin;

(b) the evidence of the first accused himself is that the external auditors had specifically asked that Lo Chok Ping to be excluded from the audit committee meeting on that day and this clearly shows they do not want to deal with the management but by an independent audit committee;

(c) since Lo Chok Ping reported to Khiudin it would be illogical to rely on Khiudin as the external auditors had excluded Lo Chok Ping from the meeting. As Lo Chok Ping was part of management, it was clear that the external auditors were approaching the audit committee in the absence of management. Accordingly further steps to be taken, should surely involve the BOD rather that the management. This is also supported by the first accused's own evidence where he admitted that "Deloitte is entitled to request Lo Chok Ping not to be present because they have a direct line to the audit committee". Knowing full well the basis for this direct line between the audit committee and the external auditors, there was very little basis for the first accused to rely on the assertions and promises made by Khiudin;

(d) the first accused own evidence that Lo Chok Ping's briefing on the fourth quarter results was after Deloitte's raising of the audit issues. According to the first accused, he had raised with Lo Chok Ping the audit issues that the external auditors briefed the audit committee. He agreed that he raised the matter with Lo Chok Ping because it was quite important. However, when Lo Chok Ping said that the matter was about documents, he said that he stopped there. It is incredible that on the one hand the first accused said it was an important issue involving contra transactions but on the other hand he simply accepted Lo Chok Ping's explanation when he said that this was an issue about documentation;

(e) Lo Chok Ping had said that he would check with finance department again is very strange as the finance department was headed by Lo Chok Ping. The circumstances under which the external auditors had raised these issues and with the size of the transactions, the nature of the transactions themselves and the fact that all this related to revenue which was to be reported the very next day to the BOD, leads to only one conclusion that both the accused intentionally withheld the serious issues raised by the external auditors from the BOD; and

(f) the first accused own evidence was that "My perception was that the finance department was not being very accommodative they wanted the bosses to push the financial department to greater efforts and assistance ..." again, is yet another example of the fact that the first accused's turning to finance department for documents was illogical given the fact that finance department was not being very accommodative.

[84] In any event I accept the fact that SP1 had stated that at the briefing to the audit committee on 14 February 2007, the audit committee were told that TGB had up to the 28 February 2007 to announce their quarterly financial results. This is also clearly set out in exh. P12. That being the case, if both the accused had intended to further investigate or seek documents from the management, they could have still alerted the BOD of the issues on 15 February 2007 as TGB had up to 28 February 2007 to issue its unaudited quarterly results. There was no reason for not alerting the BOD of these critical audit issues on

15 February 2007 and allowing the financial statements to be released to the public on that day when those issues were outstanding.

[85] The very role of the audit committee is to detect the wrongful act or conduct that is being committed in the affairs of the company. That is the very reason, according to SP9, why there is a requirement in the Bursa rules that the majority members in an audit committee must be independent and non-executive directors including the chairman. These responsibilities must be handled by the audit committee themselves and not delegated to the management. As such it is the duty and responsibility of the audit committee to raise the serious issues which were brought before them by the external auditors to the BOD irrespective of whether Khiudin or Lo Chok Ping raises them or not.

Assurances By Management

[86] The defence raised by both the accused persons that they had relied on assurances given by the management including the chief executive officer and the chief finance officer to my mind is unacceptable. Both the accused during their cross-examination had agreed that the audit committee was the gateway to the BOD, that they were the channel by which the auditors raised issues to the BOD. In other words both the accused knew what their role involved. Yet, they continually maintained that they relied on the management when they knew that the audit committee was a check and balance against management's actions. As such, to claim that they relied on management is not an acceptable defence as the very purpose of the audit committee was to bring independent judgment and advice to the BOD rather than rely on the management.

[87] SP9 had also clearly testified that as independent non-executive directors, the audit committee members cannot rely on the chief finance officer and the personnel of the finance department. According to SP9 audit committee has to play its specific role as stipulated in the bursa listing requirements. In short they must perform that role and cannot delegate that function to anyone else.

Audit Committee Not Informed Of Meetings Between The External Auditors And Loh Chok Ping

[88] Both the accused submitted that they were not aware of the meetings held between Loh Chok Ping, the Chief Finance Officer, and the external auditors. Had the accused been informed of these meetings they would have appreciated the seriousness of the external auditors briefing on the contra transactions.

[89] I am also fully aware that both SP1 and SP4 during their cross-examination were repeatedly asked regarding these meetings where Loh Chok Peng had assured the external auditors that he would get the documents sought by them. The relevant evidence of SP1 and SP4 is as follows:

SP1's evidence:

> Q: In briefing to Audit Committee did Deloitte inform Audit Committee that it had meeting with Loh on 8, 12 and 13/2 on same subject matter?
>
> A: We told Audit Committee we had meeting with management and Loh is part of management.
>
> Q: Did you brief Audit Committee that you had meeting with Loh on 8, 12 and 13?
>
> A: I did not specifically.
>
> …
>
> Based on my memory, we informed Audit Committee that we discussed this matter with management and Mr. Loh and Kelly Hoon is part of management. We did not feel necessary to single out Loh's name. By reference to management it includes the CFO.
>
> In P12 it is in one of the bullet points that we had discussed this issue with management.

SP4's evidence is as follows:

> Q: Put: the message that you wanted Audit Committee to investigate was never put across to Audit Committee?
>
> A: I disagree.
>
> Q: Agree: during meeting on 14/2 you did not inform Audit Committee that you had met Loh Chok Ping on 8/2, 12/2, 13/2 wherein Loh Chok Ping could not provide your explanation for contra transaction?

A: I disagree. As contained in the minutes, we had discussed this with management that is why we wanted to discuss this with Audit Committee in the absence of Loh Chok Ping.

Q: Stanley during testimony, said meeting with Loh Chok Peng and Kelly was never mentioned. He only said met management?

A: I can't remember whether names were mentioned. When we mean management it would mean finance manager will provide us documents but they did not provide. So in substance it means that we have not had a satisfactory explanation from management.

SP6's evidence on Lo Chok Ping reads:

Q: When Lo Chok Peng present on 15/2, he was invited specifically to brief board, (ID15) para 5.2. Did he tell you of the contra transactions.

A: He did not.

Q: He ought to brief the board?

A: That is responsibility of the Audit Committee.

[90] In my opinion it is irrelevant whether the audit committee were informed or not of the meetings between the management and the external auditors as each have their own respective specific and independent role. The external auditors had deemed it appropriate to highlight the contra transaction issues to the audit committee. The very fact that the audit committee was briefed the audit committee in the absence of Loh Chok Peng was to ensure that the management would not be present when the audit committee members were informed by the external auditors of these issues. The fact that Loh Chok Peng had briefed the audit committee after the briefing by the external auditors does not in way detract from the audit committee's responsibilities to exercise their independence of judgment on the contra transaction issues.

[91] It is interesting to note that SP6 categorically stated that chief finance officer is not involved in approving the financial statements of the company. He also said that the responsibility of approving the financial statements of the company rests on the BOD on the recommendation of the audit committee.

[92] SP9, from Bursa Malaysia also clearly stated the position under rule 15.14 of the bursa listing requirements provides that other directors and employees only attend the audit committee meeting at the invitation of audit committee so that the audit committee performs its role independently, but at the same time has ability to gain access to the assistance or information that can be provided by the employees.

[93] I am therefore of the opinion that both the accused were influenced by Loh Chok Ping cannot be accepted as a defence as firstly, the audit committee members must exercise their judgment independently of the management and secondly, the facts show that Loh Chok Ping did not attempt to influence the audit committee members on the 14 February 2007 or the BOD on the 15 February 2007. The audit committee was not stopped from raising the serious concerns raised by the external auditors to the BOD on the 15 February 2007. Both the accused had intentionally withheld such information.

Collections Made Gave The Impression That The Transactions Were Genuine

[94] The first accused in his evidence testified that he was under the impression that since collections were made, the transactions were therefore *bona fide*. It must be pointed out that the fact collections were made was in fact made known by the external auditors to the audit committee on 14 February 2007. It is also reflected in exh. P18 which state that "some collections had been done during the year. Total amount that had been paid off is approximately USD10 million". The first accused's suggestion that the collections made gave him the impression that the transactions were genuine is without merit as the external auditors had made it clear that there were collections at the time but what is more important is the fact that despite the collections being made the contra transactions appeared very unusual and lacked commercial justifications.

Minutes Of Audit Committee Meeting On 14 February 2007

[95] The defence also challenged the minutes of the 14 February 2007 audit committee meeting prepared by the external auditors (exhs. P11 and P12) as they were not prepared contemporaneously. According to SP1 who prepared both the minutes, explained that they were prepared at the same time and printed out on 7 March 2007. SP1 also said that the minutes were prepared where the

draft was sent out to SP4 for his comments. The defence argued that the details stated in exhs. P11 and P12 in respect of the external auditors' actual briefing at the audit committee's meeting on 14 February 2007 most likely may have been added much later. The details stated in exhs. P11 and P12 do not reflect accurately what the external auditors actually briefed the audit committee at the audit committee's meeting on 14 February 2007 but only the external auditor's own afterthoughts.

[96] It must be pointed out that the minutes of the audit committee meeting on 14 February 2007 are reflected in exhs. P12, P14, P18 and P76. SP1 and SP4's oral testimony is consistent with the minutes in exh. P12 and P18. Exhibit P12 was prepared by SP1 in consultation with SP4. Exhibit P18 was prepared by SP8. On the other hand exh. P14 was prepared by SP8 with the approval of both the accused in particular with the input of the first accused.

[97] It is pertinent to note that exhs. P12 and P18 have a detail account of the briefing by the external auditors on the contra transactions whereas exh. P14 does not contain these details at all. SP8 testified that exh. P14 does not reflect the contra transaction discussion as that was the instruction of the first accused. SP8's evidence reads:

> Q: When you sent to Okt 1 how done, soft copy?
>
> A: Normally will be by email or by hand.
>
> Q: 14/2?
>
> A: For 14/2 because of issues brought up by Deloitte deemed quite serious before I give him the draft I ask Okt 1 shall I put all the details or how you want me to word. Then he said, hang on first, I will need to check with other members then I will come back to you. Subsequently he said just give a very brief one because we cannot trigger the board unnecessary until we have done our part. So I came out with a quite simplified version and I sent to them and they made a few times amendments and there were a few rounds until the final version. The minutes were all prepared after Audit Committee meeting after sometime.

[98] The first accused agreed in cross-examination that exh. P14 does not contain all the details of the briefing. If the first accused had intended to be transparent about what had transpired on 14 February 2007, P14 would have contained all the details of the

briefing. It indicates that the first accused had intended the BOD not to be informed of what the external auditors had briefed the audit committee on the 14 February 2007. It is trite that whether the minutes of the meeting would alarm the BOD or not it is incumbent on the first accused to ensure the accuracy and veracity of the minutes of the audit committee meeting and the BOD informed accordingly. I am of the view that the first accused by truncating the minutes did so deliberately so as not to reflect the truth of what transpired on the 14 February 2007. Exclusion of this information indicates a dishonest intention on the part of the first accused.

[99] It must be pointed out that 14 February 2007 audit committee minutes were not approved until the first accused tendered his resignation in June 2007 and it was only upon the prompting of SP8 that he finally signed off on these minutes. According to the first accused the minutes of the meeting should have been circulated within one week of the next audit committee meeting which is three months later which would have meant that the minutes would have been ready by May 2007. Yet it was only upon his resignation in June that these minutes were finalised.

[100] I agree with the prosecution that the first accused's conduct in asking that the minutes be prepared in extract form is conduct that is influenced by the fact in issue. If he had no intention of committing the offence of submitting the misleading information to the exchange, why then did he not ensure that the minutes reflected what was discussed in the audit committee meeting on 14 February 2007. This supports the fact that he knew that the information was misleading and therefore did not want the full deliberation at the audit committee to be made known in the minutes and the BOD.

[101] The second accused in his evidence agreed that exh. P14 which were the official minutes of what transpired on 14 February 2007 at the audit committee meeting did not reflect what the external auditors had briefed the audit committee. The second accused was also part of the process involved in the finalisation of the meeting minutes. This is evident from exh. D108 which was an email sent by SP8 on 7 March 2007 with the draft minutes of the audit committee meeting attached to both the accused and Khiudin.

[102] Exhibit D108 shows that Khiudin had replied that the minutes were in order with him and the second accused had in fact copied on that email as well. Yet, in his evidence, he had said as follows:

> S: SP8 (May Tan) ada hantar kepada ahli Audit Committee draf minit mesyuarat bagi P14?
>
> J: Draf saya tidak tengok langsung. Saya tidak terlibat langsung dengan draf P14.

[103] However, when confronted with exh. D108, he agreed that he had received the draft minutes as his name was on the email. He also agreed that despite having received these draft minutes he never voiced his concern to SP8 that the minutes did not contain the audit issues there were raised by the external auditors. The second accused agreed that as an audit committee member and a member of the BOD, it was important that all the issues raised were properly recorded in the minutes. The second accused's conduct even as at 7 March 2007 shows his intention to conceal what had transpired on 14 February 2007 at the audit committee meeting. In short the evidence relating to the second accused subsequent conduct with respect to exh. P14, in particular his involvement in its approval goes towards showing his knowledge of the offence.

Board Of Director's Meeting On 15 February 2007

[104] It is pertinent to note that the first accused in recommending the approval of the fourth quarterly results addressed the BOD as follows:

> Gentlemen, we have another successful year and I would like to call Loh Chok Ping to brief us on the performance so far.

[105] The first accused then proceeded to table the fourth quarterly results for the BOD's approval. According to SP6, the BOD would only approve the financial results of TGB on the recommendation of the audit committee. Both the accused also agreed to this. The first accused when recommending to the BOD to approve the fourth quarterly results had said:

> Gentlemen, Audit Committee have gone through quarterly results and I recommend to the Board of Director to adopt or approve them.

[106] However, what is most glaring is that the first accused had intentionally hidden the contra transactions information from the board. The first accused did not inform the BOD as to the briefing by the external auditors the day before. According to the minutes of the meeting held on 15 February 2007 in exh. P15, para. 5.2, the first accused had:

> ...briefed the Board that the audit is still ongoing and the audited accounts will be out before the end of April.

[107] What is very obvious is that the first accused had deliberately witheld the contra transaction information from the BOD. He did not inform the BOD of the audit issues that the external auditors had raised on the 14 February 2007 despite the fact that the external auditors had taken time and effort to meet with the audit committee when it was deliberating on the fourth quarterly results. It is abundantly clear that the external auditors went out of their way to raise these audit issues on the eve of the release of the fourth quarterly results. I therefore agree with the prosecution that the first accused had wilfully kept the contra transactions information from the BOD on 15 February 2007 resulting in TGB's announcement of the misleading information to the public.

[108] The first accused's excuse was that the external auditor's briefing was on 14 February 2007 and the BOD's meeting was on the next day and as such the audit committee could not expect results in just one afternoon. The first accused added that the audit committee had addressed the issue raised by the external auditors by getting the finance department to do their best and that the audit committee have to rely on finance department to get the documents as they cannot go down to the finance department and take out the files. I do not accept the first accused explanation since the audit committee was informed by the external auditors that they have until the end of February to submit the fourth quarterly results the first accused also agreed that he could have told the BOD about the contra transaction issues and the BOD would have until the end of February to release the accounts. But he did not do so.

[109] In cross-examination the first accused admitted that he was not prevented from informing the BOD of the contra transaction issues and that he could at the same time have directed the finance department to do the needful. Yet he chose not to do so.

Bearing in mind all these facts coupled with the deliberate omission of details of the external auditors briefing in exh. P14 only shows that the first and second accused knew of the false or misleading statement in the fourth quarterly results and were intentionally withholding this information from the BOD.

BOD's Meeting On 15 February 2007 And The Announcement

[110] The defence argued that it was the BOD who authorised the announcement and not both the accused. To my mind it was both the accused who formed part of the BOD who authorised the announcement to Bursa Malaysia. It is not disputed that from the evidence adduced throughout this trial the audit committee members who were also BOD's members, did not, on 15 February 2007 inform the BOD as to the audit issue raised by the external auditors on 14 February 2007. It is also not disputed that the BOD had on 15 February 2007 approved fourth quarterly results upon the recommendations of the audit committee. It is also not disputed that after the BOD approved the fourth quarterly result before they were announced to Bursa Malaysia. SP6's evidence is as follows:

> The board relies on recommendation of Audit Committee. No, the board will not approve the financial statement if the Audit Committee does not recommend them.
>
> The Audit Committee would need to alert the board of the issues raised by Auditors if they can't resolve it. The Audit Committee would have to alert the board before recommending the financials to be approved and before they can be announced to the authorities, to the Bursa.
>
> When board met on 15/2 to approve the unaudited results of company we were not aware of the briefing by External Auditors to the Audit Committee. All the 3 members of Audit Committee were members of Board of Transmile.
>
> On 15.2.07 on ID15, both the first and second accused - Okt 1 and Okt 2 attended the board meeting. No, they did not raise the contra transactions at the board meeting.
>
> Unaudited statements are not final. Yes I am aware the unaudited statements are to be released to Bursa Malaysia and that is a requirement especially after approval by the Board at that quarterly meeting.
>
> I am aware even unaudited statement must not contain misleading statements.

A Audit Committee meeting finished at 1pm and Board of Director meeting at 9am next day. Yes there would be a one day gap between the 2 meetings.

The Audit Committee members are to alert the Board on issues and whether the issues would allow the Board to approve the
B financials. No they are not meant to do a full investigation. In this case if any approval by board it has to be announced, otherwise we could have people speculating on shares of company. Yes members of Audit Committee recommend to the Board, they would be aware that it would be approved and announced after
C that.

Item 5.2 of ID15. Yes the Board approved the unaudited financial result on meeting of 15/2.

The Audit Committee did not tell us of audit issues raised by
D External Auditor when recommended the approval of financials during this 15/2 board meeting.

The Chairman assured the Board the audit was ok. Yes we relied on recommendation of chairman of Audit Committee mostly and we confirmed that we relied on information of the Chairman.

E

[111] Both the accused also agreed that these financial statements had been considered by the audit committee on the 14 February 2007. Both the accused however did not alert the BOD as to what had been told to the audit committee the day
F before as this would have prevented misleading information from being furnished to the Bursa Malaysia. As to why the second accused did not brief the BOD on the issues which were highlighted to the audit committee the previous day the second accused said:

G Jimmy Chin sebagai Chairman of Audit Committee always brief the Board. Waktu yang sama Khiuddin juga ada dalam Board itu. Kemudian Khiuddin juga ada dalam meeting pada 14/2. Khiuddin semasa meeting 14/2 telah assured us dia akan follow up with Finance Department dan Loh Chok Peng dan saya expect dia
H untuk bangkitkan perkara itu. Saya pada ketika itu memadai apa yang disampaikan oleh Jimmy Chin. Saya tidak ada apa-apa untuk disembunyikan kecuali sekiranya Deloitte ada katakan stop the account.

…

I

Jimmy Chin sebagai Chairman of Audit Committee akan brief the Board. Pada masa itu Khiuddin juga ada dalam Board. Khiudin juga ada pada meeting pada 14/2.

[112] Nevertheless, the second accused admitted that though the audit committee worked collectively in its decision making he was never prevented from voicing his views both at the audit committee as well as at the BOD meetings. He also admitted that out of the nine BOD members, only three of them were audit committee members. It is my considered opinion that the second accused's explanation that he expected the first accused and Khiudin to voice the concerns of the audit committee to the BOD is not acceptable as he himself conceded that he too has the right to raise the concerns at the BOD's meeting. This shows that the second accused was in fact aware of the seriousness of the issues raised by the external auditors.

Deloitte's Audit Summary Memorandum Dated 11 May 2007 Concluded The Unadjusted Misstatements Are Immaterial And Deloitte Believed The Financial Statements Are Not Materially Misstated

[113] During the course of examination of SP4, the defence adduced exh. D70, which is an audit summary memorandum dated 11 May 2007. Based on exh. D70 the defence argued that even as late as 11 May 2007, Deloitte concluded *inter alia* that the unadjusted misstatements are immaterial and Deloitte believed that the financial statements are not materially misstated. SP4 in cross-examination confirmed that exh. D70 is part of their audit for TGB for FYE 31 Disember 2006 and it was prepared by Tan Kian Yong, who was the assistant manager involved in the audit of TGB and he is also a qualified accountant. In re-examination, SP4 confirmed that on the date when exh. D70 was printed that is, 26 May 2007, their audit was still ongoing.

[114] Learned counsel for the second accused submitted that it is safer to refer and rely on exh. D70 which is contemporaneous with the event and to draw the reasonable inferences from it than to believe SP4's subsequent recollection or version of it, particularly if he is a witness with a purpose to serve and if his evidence did not account for the statements in exh. D70. Learned counsel also argued that if the evidence admits two or more inferences, then it is the duty of the court to draw the inference in favour of the accused.

[115] Learned counsel also pointed out that despite exh. D70 being a very important document the prosecution has failed to call its maker, Tan Kian Yong. He emphasised that the prosecution never denied that exh. D70 is an audit document of Deloitte and

A that Tan Kian Yong was an assistant manager of Deloitte. Since SP1, SP3 and SP4 stated that exh. D70 was not a final document and that audit was still on going on 11 May 2007 it showed that Deloitte was not in a position to determine even three months later whether the financial statements were accurate
B or misleading. He argued that more importantly, Deloitte was of the view that on 11 May 2007 the unadjusted misstatements are immaterial and that Deloitte believed the financial statements are not materially misstated. As such the learned counsel submitted that there are gaps in the prosecution's case.

C

[116] The prosecution submitted that exh. D70 needs to be viewed with caution, particularly in the light of SP4's evidence. In re-examination, SP4 clearly explained that an audit summary memorandum is normally prepared at the conclusion of an audit.
D According to SP4, this was not a finalised document because at that material time the audit was still ongoing. SP4 clarified that exh. D70 was submitted to the Securities Commission as part of the investigations surrounding the announcement made by TGB. SP4 said that the print out date at the bottom of exh. D70
E indicated the date 26 May 2007 at 18:39:12. When further questioned, SP4 said that the reviewer column was left empty because they did not have a chance to review exh. D70 as it was already submitted to the Securities Commission.

F **[117]** When SP4 was asked further in re-examination on whether he would rely on exh. D70 when auditing TGB, he replied in the negative. According to him exh. D70 was one of the many documents contained in the audit working papers file and the auditors have to look at the entire audit working papers as a
G whole to form a conclusion on the audit and not only exh. D70. SP4's evidence reads:

> Purpose of IDD70 is audit summary Memo. It is normally prepared at the conclusion of the audit surrounding those periods as listed in these documents. This is not a finalized document
H because the audit was still ongoing. This document was submitted to the Securities Commission as part of the investigation surrounding the announcement made by Transmile that the audited accounts will be delayed. As can see on right hand bottom corner, I believe that is date and time printed example 26.05.2007. So it should be around that time submitted to the Securities
I Commission. I believe so, that it was 26.05.2007 we gave this document to the Securities Commission.

> You will notice that the accounts were only signed off on 29.06.2007. At that time the audit was still ongoing. On IDD70 - reviewer is empty - should be the manager Garry and Stanley the Audit Principal. The reviewer column is empty because we did not have a chance to review this document as it was already submitted to the Securities Commission.
>
> No I did not use this document to finalise the audit of Transmile group. This is only one of the many documents contained in the Audit Work Papers file. We have to look at the entire work papers as a whole to form a conclusion. The directors are fully responsible for the financial statements of TGB.

[118] I agree with the prosecution that exh. D70 is not a finalised document. D70 is prepared at the end of an audit. As at the time when D70 was seized by the securities commission, the audit of TGB was still ongoing and therefore the auditors themselves did not have an opportunity to finalise D70. Accordingly I am of the opinion that D70 is irrelevant to the present case and accordingly there is no need to call Tan Kian Yong to testify on this document.

Subsequent Conduct Of Both The Accused

[119] The first accused adduced several documents in the form of exhs. D34, D77, D78, D80, D81, D83, D100, D103, D104, D105, D106 and D109 to show that he had been very cooperative and that he had actively been following up since the briefing by the external auditors on 14 February 2007.

[120] It must be pointed out that all these exhibits are dated after 15 February 2007 that is after the announcement of the fourth quarterly results when the offence has been committed and the damage inflicted. Misleading information had been released to the public on 15 February 2007 at the recommendation of both the accused despite being urged by the external auditors to report the contra transactions to the BOD. I have perused and considered all these defence exhibits and I am of the opinion that I cannot attach much weight to them as the main subject matter of the offence had occurred on the 14 and 15 February 2007 and that these defence exhibits do not exonerate both the accused in any way.

[121] I agree with the prosecution that exhs. D34, D77, D78, D80, D81, D83, D100, D103, D104, D105, D106 and D109 were generated after the external auditors wrote a reminder letter

to TGB dated 16 March 2007 (exh. P16) when it became evident that TGB had not only released the fourth quarterly results on 15 February 2007 but was doing nothing to address the audit issues. Accordingly, had the external auditors had not been actively following up on these issues, both the accused would not have done any of these things that they claimed he did.

[122] However what is most damaging in this case is that the evidence shows that between 14 February 2007 until 27 April 2007, both the accused persons did not brief the BOD on the audit issues. This is despite the fact that the external auditors had raised them on 14 February 2007. The second accused admitted that it was only on 27 April 2007 when the external auditors expressed to the audit committee that they were about to issue a qualified audit opinion on TGB's accounts in the form of exh. P19A, that the audit committee then convened a BOD meeting. The first accused also admitted that part of the issues contained in exh. P19A were the same issues that were raised on 14 February 2007 by the external auditors to the audit committee.

[123] What is obvious is that 27 April 2007 was the first time the BODs were informed of the audit issue as seen in exh. P72. This is almost two and a half months after the briefing of the audit committee on 14 February 2007. The second accused admitted that the BOD expressed its disapproval of the audit committee's handling of this matter.

[124] Exhibit D114A clearly shows the role played by the audit committee as highlighted by Moores Rowland. Paragraph 6.1 corroborates the evidence of one of the members of TGB's board, namely SP6 who had highlighted the dissatisfaction of the BOD when they found out that the audit committee had failed to raise the audit issues to the BOD on 15 February 2007. This is clearly set out in para. 6.1 of exh. D114A as follows:

> Tan Sri Razak said the issues highlighted by Moores Rowland are alarming and detrimental to the Company. He added that the issues have serious implications to the executive directors and audit committee (Audit Committee) members. He said that Deloitte & Touche ("DT") had brought up the material issues to the attention of the management, the CEO and the Audit Committee and these parties had failed to inform that Board about the findings. In view of the breaches of corporate governance issues, the Board has to make a decision on the position of the Chief Executive Officer. He stressed that Chief Executive Officer

is a very important position in any company. He proposed to discuss further on this without the presence of the Chief Executive Officer.

No Action Taken By TGB Against Both The Accused

[125] I disagree with the submission by the learned counsels where they relied on SP6's admission in cross-examination that TGB did not take any action against both the accused nor were they cautioned for any failure on their part because the audit committee had exercised their duty in a responsible manner. What the learned counsels failed to point out is that in re-examination, SP6 had clearly explained that both the accused had resigned even before the BOD could consider taking any action against them. The relevant evidence of SP6 in cross-examination is:

Q: Refer ID20 - 3.5.07 - page 2 dated 14.2.07, 15.2.07, page 6 reads the highlighted part. What transpired at this meeting? Minutes do not state Audit Committee members were queried. Put: Audit Committee members present at this meeting but were not asked what transpired during briefing by Deloitte on 14/2?

A: I disagree. They were questioned as to why issues brought up by external auditors were not taken up at board meeting to approve the unaudited results.

Q: Suggest: would you know OKT1 resigned as board member somewhere after 17 or 18 Special Board Meeting?

A: I don't know exactly when OKT1 resigned. It was during this period we had this Special Board Meeting he resigned sometime then.

Q: 18th Special Board Meeting. Able to confirm OKT1 resigned board management in June 2007?

A: It's been a number of years, I can't remember.

Q: Agree: OKT1 was never reprimanded by board for not informing of audit issues raised by Deloitte?

A: I disagree. He was reprimanded. We did ask him why we were not told of the results.

Q: Reprimanded is form of punishment?

A: If the person resigned and gone, we could not take action.

A Q: Agree: after draft report by Deloitte was shown to board, OKT1 was given more task to ensure audit account are properly issued and that audit carried out by Deloitte smoothly?

A: Yes the purpose of all that was to ensure we can get a B finalized audited account.

...

Q: You in board since 2005, recall OKT2, was he cautioned or reprimanded as to his inefficiency on duties as Audit C Committee member?

A: No.

Q: Before any member of board, the board would normally caution her or reprimand them?

D

A: Yes that is correct.

In re-examination SP6 said:

> If Okt had not resigned from the Board, the Board would have E taken action against him for failing his duty to report to the Board the findings of the External Auditors to the Board and for recommending to the Board to approve the financials knowing that these same issues have not been resolved.

F **[126]** I must state that I found SP6 a very reliable and impressive witness. He appeared very composed and unshaken throughout his evidence though at times he appeared disturbed and annoyed over the fiasco in TGB. His credit remains unshaken despite being cross examined vigorously. I find no reason to disbelieve SP6.

G

Lo Chok Ping Stopped The External Auditors To The Audit Committee Meeting

[127] Much to my disbelief, the defence submitted that Lo Chok H Ping even tried to stop the external auditors to the audit committee's meeting on 14 February 2007. They relied on the evidence of SP8 who had said that a day before the audit committee's meeting on 14 February 2007, she was informed by Lo Chok Ping that the external auditors would be attending the I meeting but a few minutes before the audit committee's meeting on 14 February 2007, Lo Chok Ping informed her that the external auditors would not be coming. As such, she was surprised

to see the external auditors at the reception before the start of the meeting. To my mind it is indeed too far fetched and illogical to even make a suggestion based on these facts that Lo Chok Ping had tried to stop the external auditors to the audit committee's meeting on 14 February 2007.

The Statement By Lo Chok Ping (Exh. P96) Is Inadmissible And No Weight Should Be Given To The Statement

[128] Mr Tan Hock Chuan strongly objected to the tendering of Lo Chok Ping's statement (exh. P96). He argued that the statement by Lo Chok Ping is inadmissible and that in any event, no weight should be given to the statement. He argued that based on the evidence of Noraiza Kamarudin, the investigation officer (SP10) she did speak to Lo Chok Ping on the phone on 13 Dicember 2010 but the formal failed attempts to locate Lo Chok Ping started only way after this trial had commenced. I dismissed the learned counsel's objections on the ground that art. 145 of the Federal Constitution and s. 376 of the Criminal Procedure Code clearly provides that the prosecution determines the conduct of the trial which includes the sequence of calling of witnesses. There is simply no law that states that Lo Chok Ping must be called first. On the other hand I am satisfied that extensive attempts were made by SP10 including placing notices in the newspapers to find Lo Chok Ping but he could not be found. Accordingly I allowed Lo Chok Ping's statement to be admitted as exh. P96 under s. 32(1)(i) of the Evidence Act 1950.

[129] The learned counsel also argued that the statement by Lo Chok Ping (exh. P96) does not make any difference to the second accused as undeniable Lo Chok Ping admitted he was involved in the whole act and responsible for the overstatement of TGB's profit.

[130] To my mind admission by Lo Chok Ping and the role that he had played in TGB does not exonerate the members of the audit committee. As stated earlier the very role of the audit committee is to detect any wrongdoings in the affairs of the company. That is the very reason, according to SP9, why there is a requirement in the bursa rules that the majority members in an audit committee must be independent and non-executive directors including the chairman. As such it is the duty and responsibility of the audit committee to raise the serious issues which were brought before them by the external auditors to the BOD irrespective of

whether Lo Chok Ping as the chief financial officer raises them or not or whether he confessed being responsible for the overstatement of the financials.

Conclusion

[131] Having heard and observed both the accused during their testimony I am of the opinion that their evidence is not credible. I found their evidence to be inconsistent with the evidence of SP1, SP4, SP6 and SP8 and the documentary exhibits. I found SP1, SP4 and SP6 to be consistent, professional and precise in their evidence. I found SP8, an impartial witness, to be a credible witness. I find both the accused to be untruthful witnesses and I do not accept the evidence of both the accused in particular what transpired on the 14 and 15 February 2007. I accept the prosecution's version of what transpired on the 14 and 15 February 2007. Be that as it may, after a careful evaluation of all the evidence in this case and the lengthy written and oral submissions made by the learned defence counsels and the learned Deputy Public Prosecutor I am of the opinion that both the accused have failed to raise any reasonable doubt on the prosecution's case. On the other hand I am satisfied that the prosecution had succeeded in proving the charge against both the accused beyond all reasonable doubt. I found both the accused guilty of the charge and they were convicted of the charges faced by them.

Sentence

[132] I had considered the mitigation of both the accused put forward by their learned counsels. All the mitigating factors put forward on behalf of the first and the second accused including their age, position in life, family situations, aged and cancer stricken mother, employment and effect of the conviction on the employment, that both accused now regret and are remorseful of this whole incident were considered. I was however mindful that both the accused should have considered all these factors before they committed the offence.

[133] I also considered that both the accused are first offenders and that there is no evidence before me that they had benefited from the offence. In short they pleaded to temper justice with mercy.

[134] I had also considered the reply by the learned Deputy Public Prosecutor that both the accused had committed a very serious offence and that a custodial sentence should be imposed.

[135] In passing sentence the public interest factor must be given paramount consideration for this type of offences. There offences cannot and should not be treated lightly. Independent non-executive directors of a company or audit committee members are not a decorative pieces of a company. They hold a responsible office. The investing public shareholders, creditors and other persons having dealings with the company rely very much upon them.

[136] In the case before me, the evidence demonstrated that there was a blatant disregard of the seriousness of the concerns raised in the financial statements that is in respect of the contra transactions by both the accused. They were expressly told by the external auditors that the contra transactions were very unusual and lacked commercial justification. This was very serious and served as sufficient warning on the misleading financial statement to the accused as independent directors and experienced audit committee members. These serious concerns were never raised by both the accused at the BOD's meeting which was held the very next day, despite being advised to do so by the external auditors.

[137] Having considered all the factors I sentenced the first and the second accused to one year term of imprisonment with effect from the date of sentence and a fine of RM300,000 in default six months term of imprisonment.